**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**R[redacted], M[redacted] J[redacted]**
**[redacted]/[redacted]084**
**PIKE COUNTY CORRECTIONAL FAC**
**175 PIKE COUNTY BOULEVARD**
**LORDS VALLEY, PA 18428**

**DHS LIT./York Co. Prison/YOR**
**3400 Concord Road**
**York, PA 17402**

**Name: R[redacted], M[redacted] J[redacted]**

**A [redacted]084**

**Date of this notice: 5/17/2017**

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket



Cite as: M-J-R-, AXXX XXX 084 (BIA May 17, 2017)

File: [redacted] 084 – York, PA

Date: MAY 17 2017

In re: M[redacted] J[redacted] R[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Alice Song Hartye
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Adjustment of status; waivers of inadmissibility

This case was last before the Board on July 18, 2016, when we remanded the record to the Immigration Judge to consider the respondent's applications for waivers of his inadmissibility under sections 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h), (i), in conjunction with his application for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The respondent now appeals the Immigration Judge's November 17, 2016, decision denying his waiver applications. The appeal will be sustained, and the record will be remanded for further proceedings consistent with this opinion and for entry of a new decision.

On appeal, the respondent argues, *inter alia*, that the Immigration Judge impermissibly became an advocate, rather than an impartial adjudicator, when he *sua sponte* called two witnesses from the courtroom gallery, specifically the respondent's brother and brother-in-law, to testify in these proceedings. *See* Respondent's Brief at 15-18. We conclude that the respondent has established that the Immigration Judge's actions in *sua sponte* calling two witnesses from the gallery created at least an appearance of denying him a full and fair hearing before a neutral and impartial arbiter. *See id.*; 8 C.F.R. § 1003.1(d)(3)(ii) (2017) (de novo review); *see also Cham v. Att'y Gen. of U.S.*, 445 F.3d 683, 691 (3d Cir. 2006) (To establish a due process violation, an alien must show he was denied a full and fair hearing before a neutral and impartial arbiter, and a reasonable opportunity to present evidence on his behalf.).

"An [I]mmigration [J]udge has a responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party." *See Abulashvili v. Att'y Gen. of U.S.*, 663 F.3d 197, 207 (3d Cir. 2011) (internal citations omitted); *see also Abdulrahman v. Att'y Gen. of U.S.*, 330 F.3d 587, 595-96 (3d Cir. 2003) (Immigration Judges must "assiduously refrain from becoming advocates for either party."). Even if an Immigration Judge did not intend to

become an advocate for one of the parties, "judicial conduct [is] improper ... whenever a judge appears biased, even if []he actually is not biased." *See Abulashvili v. Att'y Gen.*, *supra*, at 207 (internal citations omitted). The Third Circuit, where this case arises, has specifically cautioned that the "Due Process Clause does not allow a neutral hearing officer to become the functional equivalent of counsel for one of the parties." *See id.*

By stepping into the role of an attorney by calling his own witnesses (with no advance notice to either party), we conclude that an appearance was created that the Immigration Judge ceased being the "neutral arbiter" due process demands and effectively assumed the role of an advocate instead. *See id.* at 207-08. In this regard, review of the relevant transcript portions indicates that, when questioning the respondent's brother-in-law, the Immigration Judge gave the strong impression that he was advocating for the government because he was attempting to discredit the respondent's wife's statements regarding the witnesses' financial status and ability or inability to assist her should the respondent be removed (Tr. at 160-64). At one point, one of the witnesses was explaining his situation and why he would be unable to assist the respondent's wife (his sister) to which the Immigration Judge replied "So would you let your sister live on the street if … her husband's not released?" (Tr. at 161). The Immigration Judge also appeared to dispute the witness's testimony regarding his situation by stating that he (the Immigration Judge) "think[s] of poverty as someone that doesn't have $12,000 cash in the bank" (Tr. at 163).

It is one thing for an Immigration Judge to ask questions of the witnesses called by the parties, but it is quite another for an Immigration Judge to supplant the role of an attorney during the proceedings by calling his own witnesses and appearing to attempt to discredit them.[1] Thus, it is difficult to conclude that the respondent received a "fair and full hearing" before a "neutral arbiter," as due process requires. *See id.* Therefore, we find that a remand is necessary to ensure that the respondent is provided a full and fair hearing and opportunity to present his claim before a neutral arbiter. Further, to avoid the appearance of bias, we conclude that the proceedings on remand should take place before a different Immigration Judge.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the record is remanded to a different Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

FOR THE BOARD

[1] In his decision, the Immigration Judge appears to refer to both of these witnesses as the wife's brothers (I.J. at 5). However, the record reflects that the Immigration Judge first called the respondent's brother and then his brother-in-law (Tr. at 158). The Immigration Judge questioned both about their financial status (Tr. at 156-59).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: [redacted]084 November 17, 2016

In the Matter of

| | | |
|---|---|---|
| M[redacted] J[redacted] R[redacted] | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

CHARGES: INA Section 237(a)(2)(A)(iii), aggravated felony under 101(a)(43)(M), (U).

APPLICATIONS: INA Section 245(a), adjustment of status, INA Section 212(h), waiver of inadmissibility, and INA Section 212(i).

ON BEHALF OF RESPONDENT: TIFFANY JAVIER, ESQUIRE

ON BEHALF OF DHS: ALICE K. HARTYE

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

INTRODUCTION AND JURISDICTIONAL STATEMENT

On or about March 3, 2015, the Department of Homeland Security filed a Notice to Appear against the above-named respondent charging him with being removable from the United States as an alien who has been convicted of an aggravated felony. See Exhibit 1.

This case is before this Court today on a remand from the Board of Immigration Appeals dated July 18, 2016. This Court considers Exhibits 1 through 8

that were previously marked, as well as Exhibit Remand 1 that was submitted by counsel for the respondent following the remand. At a previous hearing, the prior Immigration Court found the respondent removable as charged. This case went before the Board of Immigration Appeals, who determined that the respondent was not statutorily barred from applying for adjustment of status utilizing an I-601 waiver form for 212(h) and 212(i) waivers.

Bangladesh has been designated as the country of removal. However, as noted above, the respondent applied for adjustment of status in conjunction with the waivers, as noted above. The hearing on that application transpired today[1].

STATEMENT OF THE LAW

The respondent bears the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. 8 C.F.R. Section 1240.8(d);

INA SECTION 245.

The respondent has an adjustment of status application before this Court, and there appears to be no question that the respondent is statutorily eligible to apply for this form of relief. Neither party has cited any grounds that would prohibit this Court from considering the adjustment application in conjunction with the aforementioned waivers.

If statutory eligibility is established, adjustment of status may be granted in the exercise of discretion. The Court's decision depends on the facts of the particular case, and as such, is a matter of discretion and of administrative grace, not mere eligibility. Discretion must be exercised...even though the statutory prerequisites have been met. Matter of Ortiz-Prieto, 11 I&N Dec. 317, 319 (BIA 1965). A favorable

[1] It should be noted that the respondent has no other applications before this Court.

exercise of administrative discretion is warranted where positive factors such as family ties, length of residency, and hardship outweigh adverse considerations. Matter of Arai, 13 I&N Dec. 494, 496 (BIA 1970).

INA SECTION 212(h)

INA Section 212(h) allows the Attorney General in his discretion to waive the application of certain grounds of inadmissibility and allow an alien to apply or reapply for a visa for admission to the United States or adjustment of status. Germanely, INA Section 212(h) permits the Court to waive the application of INA Section 212(a)(2)(A)(i)(I) for aliens who are inadmissible due to crimes involving moral turpitude.

The Court may waive inadmissibility where an alien demonstrates that his removal from the United States would result in extreme hardship to his United States citizen or lawful permanent resident parent, spouse, son, or daughter. Extreme hardship is a hardship that is unusual or beyond that which is normally expected from removal. Matter of Cervantes, 22 I&N Dec. 560, 567 (BIA 1999)[2].

INA SECTION 212(i)

Waiver for violation of INA sections relating to fraud or material misrepresentation may be granted by the Court if the spouse, son, or daughter who is a United States citizen or LPR would suffer extreme hardship. The standards that apply to the 212(h) analysis apply to the 212(i) analysis. Therefore, the Court will consider both waivers in conjunction, and the facts indicated by the Court apply to both waivers.

After addressing whether the alien has met the initial hardship prerequisite, the Court only then determines whether the alien warrants a waiver in the

[2] In the case at bar, Government Counsel has agreed that this is not an offense where the alien should be held to the higher standard of exceptional and extremely unusual hardship to the qualifying relatives. Therefore, the Court will proceed examining this case utilizing the lower standard.

exercise of discretion. See Matter of Mendez-Moralez, 21 I&N Dec. 296, 299-300 (BIA 1996) (describing the balancing of the equities the court undertakes when determining whether a favorable exercise of discretion is warranted).

## CREDIBILITY DETERMINATION

In this case, the Court will find generally the respondent was credible. The Court is aware that the respondent's worldview of the events that leads him to be in front of this Court may make a finding of "total candor" a challenge. The Court will find that the respondent has minimized his conduct relating to his fraudulent applications and representations to the Immigration Service, as well as his testimony regarding the motives for his criminal conduct. The respondent testified that his fraudulent statements and representation regarding his Immigration applications were somehow a result of a language barrier or malfeasance on the part of an attorney. The Court is not convinced that this is an accurate representation of the events as they appear in the record of proceeding. See record of proceeding, as well as testimony generally. Although counsel for the respondent made gallant efforts to guide the respondent in his testimony towards accepting responsibility, the respondent seemed to simply blame others for his misrepresentations in Immigration proceedings and applications. Government counsel opined, based on her questions, that the respondent knowingly made misrepresentations in order to gain an Immigration benefit. The Court would find that the record supports this opinion held by Government counsel.

The respondent testified regarding his motive for his criminal conduct, which will be discussed below. The respondent seemed to suggest to the Court in direct examination that his motive for committing these criminal acts was related somehow to what could only be deemed dire financial straits in the 2011 and 2012 time period. The respondent's belief of financial difficulty seems to be at odds with his wife's

testimony. In any event, being in financial difficulties does not justify the criminal conduct of the respondent. The Court would ask any reviewing authority to carefully consider the testimony of the respondent on the issue of rehabilitation, and insight as well.

ANALYSIS AND FINDING

The Court first addresses whether the respondent has established extreme hardship to a qualifying relative, in this case, his United States citizen wife M[redacted] R[redacted] In looking over Remand Exhibit 1, the Court is aware that there are certain medical issues that relate to this witness. The respondent's wife has health issues. However, as noted by Government counsel, she does work, and she does receive Government assistance. The respondent's spouse has family here in the United States as well as abroad. In looking at Exhibit 1 Remand, tab H, the respondent's witness outlines her medical issues, and this is supported by additional documents in Exhibit H regarding her ongoing medical treatment. The Court would note that the respondent's spouse, in her letter to the Court, painted what could only be deemed as a dire financial picture for her brothers. The Court is not persuaded by the statement and assertions in her letter to the Court that her brothers were both living in "poverty in New York."

The Court would find the testimony from the respondent, as well as his spouse, regarding finances to be less than helpful. The respondent and his spouse spent money on a new car in 2013. The respondent seemed to suggest that it was a $7,000 to $8,000 purchase from an auto auction, and the wife's testimony was significantly different. The wife testified that it was an approximately $30,000 car, and that she still owned the car. The Court is further confused as to the exact financial situation of the respondent, his wife, and his spouse due to their purported taxes. See

pre-sentence investigation, as well as Remand Exhibit 1, tab H. The Court would note that since the respondent's detention for his criminal conduct, as well as his administrative detention regarding his Immigration charges, that the family has suffered financial hardship. The Court would specifically make that finding. The Court is well aware that when one spouse is not working due to incapacitation, whether it be from a medical issue or from a criminal incarceration, that it is difficult on the family as a whole.

The Court next addresses the potential hardship to the respondent's United States citizen son [redacted]. The Court is aware that Remand Exhibit 1 outlines the respondent's academic issues, as well as his academic successes. The Court is aware that the respondent's son misses his father. The Court would be blind to the realities of life if it did not understand that the respondent's son misses him. The Court finds no absolutely no joy in separating a husband from a wife or a husband from a child. However, the Court feels duty bound to apply the applicable hardships as delineated and articulated by the respondent to the law as the Court sees it.

At best, the Court would find the respondent's belief that his son would suffer hardship if he chose to go with the respondent to Bangladesh would be a fear of medical issues relating to unclean water, mosquito-borne illness, as well as dysentery. While the Court understands that the living conditions in Bangladesh are not equivalent to those in New York, the Court is also aware that any ongoing medical problems to his son would be speculative at best. A trip seven years ago wherein the son was sick does not establish a hardship that would rise to the level of extreme hardship as defined by case law.

The Court will not waive inadmissibility in this case, inasmuch as the Court will specifically find the record of proceedings does not support a finding of extreme hardship to the United States spouse or son of the respondent. The Court would

specifically find that the respondent has failed to meet his burden of proof and does not demonstrate that the hardship that his wife or child would suffer is unusual or beyond that which would be normally expected from removal. Even if the Court had found the requisite hardship being met, it must turn its attention in this decision to the discretionary factors of this case.

The Court now proceeds to the balancing of the positive and negative equities in the respondent's case. The Court would find that the respondent has established some favorable equities.

One positive equity established by the respondent is his family ties. As noted above, the respondent's wife and son are United States citizens, as well as two brothers and two sisters are either legal permanent residents or United States citizens. The respondent does not appear to have much family remaining in his country of citizenship, aside from his cousins. The Court would note that the respondent has lived here for many years. However, as noted above, the respondent lived many years in the United States based on fraudulent representations made to the Immigration Service. The fraudulent misrepresentation to the Immigration Service has a tendency to diminish part of the positive equities relating to the respondent's long-term ties to the United States.

It is also clear that the respondent's family will suffer some hardship if he were to be removed. The respondent's son was previously in Bangladesh and had dysentery. The respondent is concerned about his ability to find work if he is deported and his family joins him in Bangladesh, and as noted above, his wife has documented medical problems.

It is also clear that the respondent would suffer some hardship if he is removed. Specifically, he would be away from his family should they determine that

they will not follow him to Bangladesh. The Court would note that the respondent is college educated. He does have a degree from a college in his home country. The respondent is a property owner with his brothers relating to the family home. However, it appears that the respondent's cousins are now living in the home. The respondent seemed to suggest to the Court that he could live in this home if needed. The Court would also note that the respondent's wife also has family that lives in Bangladesh.

One of the factors that the Court looks at is the respondent's employment history. The respondent has been employed as either a delivery person or a taxi driver for many years. There was some conflicting testimony from the respondent and his wife as to what his exact occupation was. A reviewing authority can review the testimony of the respondent wherein he indicated he was a delivery driver, as well as the respondent's spouse's testimony where she indicated that he was a taxi driver and simply left New York to go to Arkansas because he did not want to drive a taxi anymore.

As it relates to employment history, the Court is somewhat confused as to the extent and nature of his employment, and to some degree, to an extent, the nature of his wife's employment. The respondent's taxes, as indicated in the PSI, presumably drafted around 2015, indicate that in the previous three years he had made approximately $10,000 for two years and $5,000 income for the last year. The pre-sentence investigation indicated refunds in the amount of $3,000 for two years, and approximately $2,000 the last year. The Court and counsel made herculean efforts to try to understand the economics of the respondent's testimony in light of the information in the pre-sentence investigation, as well as his own testimony. The Court will find the respondent has failed to meet his burden of proof regarding the positive equities regarding his employment and his financial situation.

The Court believes that the respondent has demonstrated some degree of

rehabilitation. However, the Court would note that the respondent consistently minimized his conduct, both regarding Immigration fraud as well as his role in the criminal scheme. Although a showing of rehabilitation is not an absolute prerequisite in every case, the respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. See Matter of C-V-T-, 22 I&N Dec. 7, 12 (BIA 1998). The Court is aware that this is the respondent's first contact with the criminal justice system. However, the Court would note that the criminal contact involves a large-scale fraud scheme.

The Court will address other favorable factors which are required to be analyzed by case law. The respondent's history of service in the country's armed forces is non-existent. The respondent testified that he has no business or property ties, with the exception of apparently owning a 2013 RAV4 vehicle. The respondent's community involvement, according to his testimony, included donating books to a library in Arkansas.

The Court now turns to the respondent's negative factors. The most obvious negative factor is the respondent's criminal history. The Board of Immigration Appeals, the respondent's counsel, as well as Government counsel, are well aware of the respondent's fraudulent conviction. See Exhibit 1; see Government exhibits relating to the records of conviction and pre-sentence investigation. The respondent testified he was in financial need and resorted to criminal activity. The respondent in his testimony took responsibility. However, the Court would note that his testimony regarding motive when taken in conjunction with his wife's testimony is murky. Specifically, regarding the respondent's criminal conduct, the Court would note that Mr. Reza was a participant in a very serious and substantial bank fraud conspiracy. The conspiracy was broad. It overall did, according to the district court judge, substantial financial damage and

victimized numerous banks. The total losses overall were over $8,000,000. Although Mr. Reza's role was minor in the grand scheme of the conspiracy, he was an integral step in the process that allowed this substantial fraud to proceed. In particular, he was one of the account holders who opened bank accounts in the name of fake companies, deposited counterfeit checks into those accounts, and withdrew money from those accounts before the checks were identified as counterfeit. The respondent passed the money upward in the chain of culpability, and was given a percentage or some amount for his role by the managerial-level participants in this conspiracy. Nevertheless, as noted by the district court, without Mr. Reza and others in this role, this conspiracy could not have occurred. He was vital to its success. The Court would also note that the respondent has been ordered to pay substantial amounts of restitution, in the neighborhood of approximately $120,000. The Court would note that the respondent claims that he only received a certain percentage of that money. However, the district court saw it fit to order that he pay full restitution.

A significant secondary negative factor that this Court must consider is the Immigration fraud. The record is clear the respondent has not hesitated in the past to make misrepresentations in order to gain an Immigration benefit. As noted above, the respondent's testimony seemed to misdirect blame from him and minimize his own conduct.

Therefore, in terms of discretion and balancing the foregoing positive and negative factors, the Court concludes that the negative factors outweigh the positive factors in this case, and that the respondent's application for adjustment of status, as well as the accompanying waivers, be denied. The Court issues the following orders.

## ORDERS

IT IS ORDERED that the respondent's application for a waiver under INA

Section 212(h) and Section 212(i) be denied.

IT IS FURTHER ORDERED that the respondent's application for adjustment of status under INA Section 245(a) be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Bangladesh.

***Please see the next page for electronic signature***

JOHN P. ELLINGTON
Immigration Judge

//s//

Immigration Judge JOHN P. ELLINGTON

ellingj on January 26, 2017 at 1:02 PM GMT