U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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333 South Miami Ave., Suite 200
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Name: HENRY, EVERTON DANE **A089-425-229**

Date of this notice: 3/18/2011

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.
Greer, Anne J.
Pauley, Roger

File: A089 425 229 - Miami, FL Date: MAR 18 2011

In re: EVERTON DANE HENRY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eran Ben Ezra, Esquire

ON BEHALF OF DHS: Paulette R. Taylor
Assistant Chief Counsel

CHARGE:

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

APPLICATION: Adjustment of Status

The respondent appeals from the Immigration Judge's November 17, 2009, decision pretermitting his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded for further proceedings.

We review the Immigration Judge's findings of fact, including adverse credibility determinations, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). All other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent was admitted as a "crewman," as defined in section 101(a)(10) of the Act, 8 U.S.C. § 1101(a)(10), and therefore, he was ineligible for adjustment of status pursuant to 245(c)(1) of the Act. (I.J. at 3). We have held that in determining whether an alien was admitted as a crewman, the alien's visa, as well as the circumstances surrounding his entry into the United States, should be examined. *See Matter of G-D-M-*, 25 I&N Dec. 82, 85 (BIA 2009); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962). In making her determination that the respondent was admitted as a crewman, the Immigration Judge properly examined the respondent's visa (I.J. at 3). However, despite the fact that the respondent, through counsel, indicated that it was not his intent to enter the United States as a crewman, the Immigration Judge did not question the respondent about his intent (Tr. at 13). *See* Respondent's Addendum to Pretrial Legal Memorandum filed on October 29, 2009 at 3. Because the circumstances surrounding the respondent's admission

were not fully examined, we will remand the record for further proceedings, and the entry of a new decision.

On remand, the Immigration Judge shall conduct a new hearing to consider the circumstances surrounding the respondent's entry to determine whether the respondent entered the United States to work as a crewman. The parties are free to submit additional evidence, including testimony, regarding the respondent's eligibility for relief. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with this opinion, and for entry of a new decision.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File A 089 425 229 November 17, 2009

In the Matter of

EVERTON DANE HENRY,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) non-immigrant remained longer than permitted.

APPLICATIONS: Adjustment of status pursuant to Section 245 of the Immigration and Nationality Act and, in the alternative, voluntary departure pursuant to Section 240B(b).

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Kenneth Panzer, Esquire	Paulette Taylor, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of the country of Jamaica who was last admitted to the United States at Miami International Airport on August 3, 2002 as an alien in transit or a C-1. He sometime after that was placed into removal proceedings by the Department of Homeland Security.

There is one removal charge referenced on the Notice to Appear. That charge in this case has been established via clear and convincing evidence via the pleading process. The Notice to Appear was clearly issued and served more than one calendar year after the respondent's last arrival and admission into the United States. So, therefore, that means he is eligible to apply for voluntary departure in the alternative, pursuant to Section 240B(b), which

indeed he has done and which will be the concluding portion of this instant decision.

The record is also clear that the respondent is the beneficiary of an approved I-130 visa petition as the spouse of a United States citizen. That would make an immigrant visa immediately available to him. And since he was inspected and admitted to the United States at Miami International Airport, then, therefore, the respondent would be, certainly, prima facie eligible to apply for adjustment of status pursuant to Section 245 of the statute. We do have all the documentation in the record regarding that application.

There is some evidence in this case that the respondent may have been arrested at some time for some criminal charges, but the record is also clear that those charges were ultimately not pursued by the authorities of the state of Florida and, therefore, he is not inadmissible to the United States on any proscribed ground found at Section 212(a) of the statute.

Since this case has been before the undersigned, the Board of Immigration Appeals, with regard to the ability of an alien to seek cancellation of removal under 240A(b) of the statute, has issued the precedent decision of Matter of G-D-M, 25 I&N 82 (BIA 2009). In that particular case, the BIA found that an alien who had actually never even been technically admitted to the United States as a crewman, but who was coming to the United States to join the ship, met the definition of "crewman" found at

Section 101(a)(10) of the Immigration and Nationality Act. That was not expressly discussed in the decision, but the BIA found that, pursuant to Section 240A(c) of the statute, ~~that~~ the applicant for cancellation in that case was not eligible because, even though the applicant had actually never arrived in the United States on a vessel or aircraft upon which or in which the alien was actually employed, that, nonetheless, the alien was a crewman, and therefore, subject to the bar.

Despite the undersigned's, perhaps, lack of agreement with this decision from the Board of Immigration Appeals, it is binding authority. It is a very sweeping decision, as a matter of fact, because, unlike the present case, where the respondent previously had been in the United States and had worked as a crewman, ~~and~~ despite the fact that as he told us today in his testimony, the only visa that he was ever in possession of was in fact a C-1 or alien in transit/D crewman visa at the time that he arrived and was admitted at Miami International Airport. The Court still finds that the broad language contained in Matter of G-D-M indicates that the proper course here will be to follow the BIA precedent and to find that the respondent is ineligible for adjustment of status under 245(c) since the sweeping language contained in Matter of G-D-M indicates that he was, indeed, admitted to the United States, albeit at the airport, in his capacity as a crewman. Therefore, he would not be eligible for adjustment of status. The Court's decision here then will be to

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pretermit ~~for~~ the adjustment of status and to, therefore, deny it.

The respondent, however, certainly is eligible for voluntary departure in the alternative. My decision herein will be to grant him ~~the~~ voluntary departure until December 17, 2009. That will coincide with the date of the submission of the appeal of the remaining portion of the Court's decision. It will also be premised upon the posting of the required voluntary departure bond before close of business on November 24, 2009, which is five working days from today's date. Should respondent fail to file an appeal of my decision and should he fail to post the $500 bond, then my order will revert, thereafter, to a removal order to the Court-designated country of Jamaica.

The removal charge in this case has been established. There is no presentation that the respondent is eligible for any other form of relief from removal. And, based on the foregoing, the following order of the Court will be entered.

ORDERS

The application for adjustment status pursuant to Section 245 of the statute is hereby pretermitted and therefore, DENIED.

The respondent is granted voluntary departure until December 17 of 2009.

NANCY R. MCCORMACK
Immigration Judge
Miami, Florida
November 17, 2009

CERTIFICATE PAGE

I hereby certify that the attached proceeding before NANCY R. MCCORMACK in the matter of:

EVERTON DANE HENRY

A 089 425 229

Miami, Florida

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Zaneta Walthour (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

January 10, 2010
(Completion Date)