U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: D[redacted], P[redacted] A[redacted]

A [redacted]-674

Date of this notice: 8/24/2018

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:
Grant, Edward R.
Kendall Clark, Molly
Guendelsberger, John

[illegible]
Userteam: Docket

File: [redacted] 674 – New York, NY Date: AUG 24 2018

In re: P[redacted] A[redacted] D[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adam W. Moses, Esquire

APPLICATION: Adjustment of status; waiver of inadmissibility

The respondent, a native and citizen of India, appeals from the decision of the Immigration Judge, dated July 5, 2017, denying her application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) in conjunction with a waiver of her inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be sustained and the record will be remanded.

We review the findings of fact made by the Immigration Judge, including the issue of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent conceded her removability under section 237(a)(1)(B) of the Act, 8 U.S.C. § 1227(a)(1)(B), for remaining in the United States without authorization after her visitor's visa expired (Exh. 1; IJ at 2; Tr. at 13).[1] The respondent sought adjustment of status under section 245(a) of the Act based on an approved immediate relative visa petition filed on her behalf by her United States citizen daughter. The respondent also sought a waiver of her inadmissibility under section 212(h) of the Act due to her 2013 conviction for the offense of mail fraud in violation of 18 U.S.C. § 1341.

The Immigration Judge pretermitted the respondent's application for adjustment of status and 212(h) waiver based on a partial adverse credibility finding and on the determination that respondent is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a benefit under the Act by fraud or willful misrepresentation due to an omission on her biographical Form G-325A submitted in support of her ex-husband's asylum

[1] The DHS also charged the respondent with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined in section 101(a)(43)(M) of the Act, 8 U.S.C. § 1101(a)(43)(M), based on her 2013 federal mail fraud conviction (Exhs. 1, 2). However, the respondent denied the charge and the Immigration Judge declined to rule on it (IJ at 2; Tr. at 3-4).

application in the early 1990s (IJ at 10-13).[2] The Immigration Judge further determined that respondent lacked the requisite qualifying relative for a fraud waiver under section 212(i) of the Act, 8 U.S.C. § 1182 (i) (IJ at 13).

First, we will address the Immigration Judge's "mixed" credibility finding (IJ at 10-11). The Immigration Judge found that "much of the respondent's testimony was credible in terms of her relationship with the family, business experience, and volunteer activity." (IJ at 10). The Immigration Judge did not find credible the respondent's explanation for the omission regarding her residence in Qatar on the Form G-325A prepared in support of her ex-husband's asylum application (Form I-589). We agree with the respondent's arguments that the Immigration Judge's partial adverse credibility is based upon speculation and conjecture (IJ at 10-11; Resp. Br. at 16-17). Accordingly, we conclude that this adverse credibility finding is clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

For example, the Immigration Judge discredited the respondent's testimony because the "Form G-325A is prepared in English" and English is the respondent's native language, and "the respondent is educated and sophisticated" and "she [the respondent] knew she needed to extend her stay once in the United States on her nonimmigrant visa that was about to expire," and "she [was] able to form a successful business and pass her brokerage exam in the United States" (IJ at 10-11). Based on all of this, the Immigration Judge determined that it was implausible that the respondent would not know she needed to include her address in Qatar on the Form G-325A (IJ at 11). These aspects of the Immigration Judge's adverse credibility determination are clearly erroneous because they are improperly speculative and have little or no bearing on the respondent's veracity. *See, e.g., Rizal v. Gonzales*, 442 F.3d 84 (2d Cir. 2006); *Chen v. United States Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006).

The respondent testified that the instructions on the Form G-325A were confusing and the address listed on this biographical form was her permanent address as opposed to her temporary corporate housing in Qatar (Tr.at 89, 146-47, 151; Exh. 8, tabs A-C; Resp. Br. at 16-17). She further argues that she and her ex-husband returned to India for months at a time over the 8 year period her ex-husband worked on projects in Qatar (Tr. at 146-449; Exh. 8, tabs A-C). Moreover, on appeal the respondent argues that her ex-husband's application and their supporting documentation were prepared by Attorney Paul Freedman who resigned from the New York State Bar and was suspended from practice before the Board and Immigration Courts in December 2001 (Resp. Br. at 10-11). We find the respondent's explanations for the omission plausible in light of the evidence in the record.

Next, we will address the Immigration Judge's determination that the respondent is ineligible for adjustment of status because she did not meet her burden to establish that she is not

[2] We note that the evidence submitted by the DHS for purposes of impeachment, namely the respondent's ex-husband's asylum application (Form I-598), as well as his and the respondent's biographical information (Form G-325A), are undated (Exh. 7). Moreover, the respondent's husband's asylum application (Form I-589) is not signed either by him or Attorney Freedman, the preparer (Exh. 7).

inadmissible under section 212(a)(6)(C)(i) of the Act. Specifically, the Immigration Judge found that the respondent's failure to disclose the fact that she resided outside of India for a number of years on the Form G-325A filed in connection as a derivative of her ex-husband's asylum application (Form I-589) was a material misrepresentation because her failure to disclose this cut off a line of questioning that may have led an asylum officer to find that she had been firmly resettled in Qatar, or may have called into question her fear of return to India (IJ at 11-13). The respondent argues that her omission was not willful because the information she did include on the Form G-325A is true, i.e. her prior address in India, and that she did not intend to omit the information, rather it was an error and misunderstanding on her part (Tr. at. 89, 146-47, 151; Exh. 8, tabs A-C; Resp. Br. at 13-15).

An alien is inadmissible within the meaning of section 212(a)(6)(C)(i) of the Act if he commits "fraud" or makes a "willful" misrepresentation of a "material fact." *Cf. Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994) (emphasis added). We note that an applicant for admission to the United States has the burden to establish that he or she is not inadmissible and has proper documentation for entry. *See* section 291 of the Act, 8 U.S.C. § 1361. While cognizant of this fact, we have held that, due to the serious consequences of finding an alien inadmissible for fraud, the factual basis for such a finding should be subject to close scrutiny. *Matter of Shridel*, 19 I&N Dec. 33 (BIA 1984); *see also Matter of Y-G-*, 20 I&N Dec. at 794; *Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979). Fraud requires an intentional, deliberate, and voluntary misrepresentation; it may not be based on a mistake, mere negligence, or inadvertence. *Emokah v. Mukasey*, 523 F.3d 110, 116-17 (2d Cir. 2008).

We agree with the respondent that the evidence does not objectively establish that she willfully omitted her address in Qatar for the purposes of obtaining a benefit under the Act. We credit the respondent's explanation that it was an inadvertent error on her part and not an attempt to cut off any potential line of questioning for an asylum officer regarding her ex-husband's asylum claim. We also take notice of the respondent's appellate arguments that her prior attorney who helped prepare the forms in question has been disbarred and suspended from practice before the Board and the Immigration Court (Resp. Br. at 10-11). We find this significant given the Immigration Judge's reliance on the fact that the respondent and her ex-husband were represented, and, if either of them had questions about the Form G-325A, they could ask their attorney (IJ at 12).

As such, we reverse the Immigration Judge's determination that the respondent is inadmissible under section 212(a)(6)(C)(i) of the Act and requires a waiver under section 212(i) of the Act. We will remand the proceedings to the Immigration Judge for further adjudication of the respondent's application for adjustment of status in conjunction with a waiver of her criminal inadmissibility under section 212(h) of the Act, including whether the respondent merits relief in the exercise of discretion. We express no opinion regarding the ultimate outcome of these proceedings at the present time.[3]

Accordingly, the following order will be entered.

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[3] We decline to reach the respondent's additional appellate arguments as they are not necessary for the disposition of the respondent's appeal.

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

FOR THE BOARD