U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: UTZERI, LUCA

A 087-211-857

Date of this notice: 7/16/2014

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:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

schwarzA
Userteam: Docket

File: A087 211 857 – San Francisco, CA

Date: JUL 16 2014

In re: LUCA UTZERI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anoop Prasad, Esquire

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: Termination

The respondent, a native and citizen of Italy, appeals from the Immigration Judge's decision dated January 26, 2011, granting the Department of Homeland Security's (DHS's) motion to terminate proceedings as improvidently commenced. The appeal will be sustained, and the record will be remanded.

We review the findings of fact made by the Immigration Judge for clear error. C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burdens of proof and issues of discretion, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We disagree that the DHS has met its burden of demonstrating that the respondent entered the United States through the Visa Waiver Pilot Program (VWP) and waived his right to contest his removal. *See* section 217(b) of the Immigration and Nationality Act, 8 U.S.C. § 1187(b); *see also Galluzo v. Holder*, 633 F.3d 111 (2d Cir. 2011) (placing the burden of proving the waiver of the right to contest removal on the DHS). In support of its motion, the DHS submitted a copy of the respondent's passport, which contains an entry stamp of October 1, 1994, but does not indicate the respondent's status at the time of his admission (I.J. at 2).[1] The DHS also submitted manuals that indicate that the passport annotation "WT" indicates that a person is an entrant under the VWP (I.J. at 2). However, as the DHS concedes, the most recent entry stamp in the respondent's passport does not bear this annotation (I.J. at 3). The DHS also submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, filed by the respondent as well as a Form I-130, Petition for Alien Relative, filed by the respondent's wife listing his last admission status as "visa waiver" (I.J. at 3).

The Immigration Judge held that the respondent's statements in his application constituted a concession regarding his VWP status in 1994, and that he had not explicitly retracted that concession (I.J. at 4). Additionally, the Immigration Judge held that because waiver of the right

[1] The respondent's passport does show that he was admitted as a VWP entrant on December 22, 1993 (I.J. at 2-3).

to contest removal is a condition precedent to admission through the VWP, *see* section 217(b) of the Act, the respondent had waived his right to a removal hearing when admitted (I.J. at 4). Finally, the Immigration Judge held that whether the respondent had done so knowingly and voluntarily was irrelevant, as he could not show prejudice even if the waiver had not been knowing or voluntary (I.J. at 4). *See Bingham v. Holder*, 637 F.3d 1040, 1047 (9th Cir. 2011); *Bradley v. Att'y Gen. of U.S.*, 603 F.3d 235, 240-41 (3d Cir. 2010); *Bayo v. Napolitano*, 593 F.3d 495, 506 (7th Cir. 2010).

While the respondent could have been processed as a VWP entrant in 1994, given his country of origin, the record is insufficient to establish that the respondent was in fact admitted under the VWP and that he waived his right to a removal hearing. The DHS has the burden of proving that the respondent entered as a VWP participant and waived his right to contest removal, and it has not done so here. In the cases cited by the Immigration Judge, the alien either *conceded* that he entered under the VWP, *Bradley v. Att'y Gen. of U.S., supra,* at 239, or the DHS provided direct evidence of such, *Bayo v. Napolitano, supra,* at 498. *See also Bingham v. Holder, supra,* at 1043 (a copy of the signed Form I-94W was placed in the record shortly before oral argument); *Galluzzo v. Holder*, 633 F.3d 11 (2d Cir. 2011) (alien conceded he was admitted under the VWP).

Here, DHS has provided no direct evidence, such as a Form I-94W or passport stamp annotated with the "WT" code, that the respondent entered under the VWP. Additionally, the respondent does not concede that he entered through the VWP. While his Forms I-485 and I-130 filed with U.S. Citizenship and Immigration Services state that he was last admitted under the VWP, the respondent argues that he relied on his attorney's speculation as to his status during his 1994 admission when filling out these forms, and does not have any independent recollection of having entered through the VWP.[2] We have stated that, "absent egregious circumstances," an attorney's concessions made before, during, or even after a proceeding are binding upon his or her clients when they are distinct and formal, and made by an attorney acting in his professional capacity as a tactical decision. *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986); *see also Santiago-Rodriguez v. Holder*, 657 F.3d 820 (9th Cir. 2011); *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986). However, "an alien is not bound by his counsel's factual admissions or concession of removability if the alien subsequently offers evidence proving that the factual admissions and concession . . . were untrue or incorrect." *Santiago-Rodriguez v. Holder, supra*, at 832 (internal quotation marks omitted) (stating that allowing an alien to be removed on the basis of a barebones admission made by an attorney in a written motion despite record evidence demonstrating that the admission could be false is inconsistent with *Matter of Velasquez, supra*, and due process). Additionally, an alien can withdraw his attorney's admission where it was the result of unreasonable professional judgment. *Santiago-Rodriguez v. Holder, supra*, at 832.

As noted above, the respondent's last entry stamp does not bear any annotation showing that he was admitted under the VWP, nor is there any other independent evidence of a VWP admission. The respondent states that he does not know in what status he last entered the United States, such that he could have shared such information with his prior attorney. *See id.* at 832

[2] In his "Opposition to DHS Motion to Terminate" filed with the Immigration Court, he stated that while "[i]t is possible that [he] waived [his] right to a hearing and that [he] was admitted under the Visa Waiver Program in 1994," he was unsure if this was the case.

(finding counsel provided ineffective assistance to alien by admitting to factual allegation without any factual basis for doing so). Additionally, given that this "concession" was made in an application for adjustment of status, and that a VWP entry is a bar to such relief, *see Momeni v. Chertoff*, 521 F.3d 1094, 1096-97 (9th Cir. 2008), it is unclear how it could be seen as a tactical decision by the prior attorney. *Cf. Matter of Velasquez, supra*, at 383 (finding an admission as to deportability to be a reasonable tactical decision where it enhanced the alien's chances of securing a favorable action on a motion to change venue). While the respondent's prior attorney may have made an educated guess regarding the respondent's status during his 1994 admission, we conclude that such a statement is insufficient, in the absence of any other evidence (and where the evidence in fact undercuts this admission), to meet the DHS's burden of demonstrating that the respondent entered under the VWP.

Because the record contains insufficient proof that the respondent was even admitted in 1994 through the VWP, we cannot conclude that he waived his right to contest his removal in the absence of any direct evidence. *See Galluzzo v. Holder, supra*, at 115 (holding that the alien's status as a VWP entrant alone was insufficient to demonstrate a waiver absent direct evidence of a completed waiver); *cf. Bradley v. Att'y Gen. of U.S., supra,* at 239-40 (holding that the alien's admission that he was admitted under the VWP combined with the "arrival record" portion of the Form I-94W was sufficient to demonstrate a waiver of the right to a removal hearing because waiver is a condition precedent to VWP admission). Accordingly, the appeal will be sustained, and we will remand for the determination of removability and the respondent's eligibility for relief. On remand, the parties are not foreclosed from providing additional evidence on the issue of whether the respondent entered through the VWP. Additionally, the DHS will have the opportunity to lodge any additional charges.

ORDER: The appeal is sustained.

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

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A087 211 857 - San Francisco, CA

Date: JUL 16 2014

In re: LUCA UTZERI

DISSENTING OPINION: Patricia A. Cole, Board Member

Board Member Patricia A. Cole respectfully dissents. I would affirm the Immigration Judge's decision to terminate the respondent's proceedings.

The Immigration Judge found that the evidence submitted by the Department of Homeland Security (DHS), Form I-485, Application to Register Permanent Residence or Adjust Status, filed by the respondent as well as a Form I-130, Petition for Alien Relative, filed by the respondent's wife both listed his last admission status as "visa waiver" (I.J. at 3) and constituted a concession regarding his VWP status in 1994. He further found that the respondent had not explicitly retracted that concession (I.J. at 4). In fact, as noted by the majority, the respondent stated in his "Opposition to DHS Motion to Terminate" filed with the Immigration Court, that while "[i]t is possible that [he] waived [his] right to a hearing and that [he] was admitted under the Visa Waiver Program in 1994," he was unsure if this was the case.

The majority does not address why the Immigration Judge's findings are erroneous nor why these DHS submitted documents are not "direct" evidence sufficient to establish the respondent's admission to the United States as a VWP participant. The majority relies on what documents are NOT in evidence, a Form I-94W or passport stamp annotated with the "WT" code, to conclude the DHS provided no direct evidence that the respondent entered under the VWP without explaining why the evidence DHS did submit was not sufficient. Further, the respondent has not offered any evidence to prove that his admissions that he was a VWP participant were untrue or incorrect.

I would affirm the Immigration Judge's decision.

Patricia A. Cole
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Francisco, California

File No.: A 087 211 857 January 26, 2011

In the Matter of	)	
	)	
LUCA UTZERI	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(B).

APPLICATIONS: Motion to terminate by DHS.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Sun Yun Ling	Michael Steinberg

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings were commenced with the filing of the Notice to Appear on September 30, 2009. Respondent is alleged to be a native and citizen of Italy admitted to the United States as a visitor traveling without a visa under the Visa Waiver Program with permission to remain until December 30, 1994. It is further alleged that respondent submitted an application for permanent residence on February 16, 2009, which was denied on July 21, 2009, and that respondent remained in the United States beyond December 30, 1994 without authorization. He is charged under Section 237(a)(1)(B).

Respondent has not entered pleadings to the Notice to Appear. Instead, the Government filed a motion to terminate removal proceedings as improvidently commenced since respondent entered the United States under the Visa Waiver Program and under such program respondent is not entitled to be placed in removal proceedings but may be removed administratively without the issuance or filing of a Notice to Appear. The waiver of respondent's right to contest removability other than as a basis for an application for asylum is a condition precedent to entry on the Visa Waiver Program. See INA Section 217(b). The Government attached a copy of respondent's passport with an entry stamp of October 1, 1994 to its motion to terminate. Respondent opposes the motion to terminate arguing that it is not clear that respondent was admitted under the Visa Waiver Program noting that there is no explicit annotation of this on the entry stamp of October 1, 1994. Respondent further argued that there is no evidence of an explicit waiver of rights as required by Momeni v. Chertoff, 521 F.3d 1094 (9th Cir. 2008). Respondent conceded, however, that it was possible that he had been admitted under the Visa Waiver Program and that he had waived his right to a hearing.

The Government response contained the following evidence: first, the Government manuals which indicate that the annotation W-T means that respondent is a "waived tourist," that is an entrant under the Visa Waiver Program. The stamp for the prior

entry in 1993 has this annotation, although the Government concedes that the most recent entry stamp does not. Second, the Government submitted respondent's I-485, which lists his status as visa waiver and the I-130 filed on respondent's behalf by respondent's United States citizen wife, which states that respondent entered under the Visa Waiver Program. The Government argued that respondent would have testified under oath that he entered under the Visa Waiver Program presumably because that entry was checked off on the I-485 indicating that he was asked that question at his adjustment interview at CIS and answered under oath consistently with what is stated on the application.

The Department argues that under the statute respondent waived his right to contest removability as matter of law under 8 C.F.R. Section 217.4(b)(1). Respondent, in turn, responded that the Department of Homeland Security has the burden of proof that there is a knowing and voluntary waiver of rights. Respondent acknowledged that the Ninth Circuit has not ruled on the issue of the Government's burden of proof in this context but cited Bayo v. Napolitano, 593 F.3d 495 (7th Cir. 2010), and Bradley v. Attorney General, 603 F.3d 235 (3rd Cir. 2010) as holding that the Department of Homeland Security has the burden of proving that there was a knowing and voluntary waiver of rights. What respondent's brief does not disclose is that both the Seventh Circuit and Third Circuit in the above-cited cases held that in the context of the Visa Waiver Program, the issue of

a knowing and voluntary waiver is essentially moot in that entrants under the Visa Waiver Program have no right to enter the United States without a waiver of rights, including the right to contest removal proceedings. If an applicant for admission refuses to sign the waiver, he or she is simply denied admission. Therefore, respondent cannot show prejudice even if the waiver of rights was not knowing and voluntary. In this case, respondent has made prior admissions of entry on the Visa Waiver Program, see his I-485, and does not here retract that prior admission specifically. The Department of Homeland Security is correct that waiving the right to contest removability in these proceedings is a condition precedent to entry on the Visa Waiver Program. Respondent does not specifically deny that he made such a waiver. The Department of Homeland Security's motion to terminate is therefore granted.

MIRIAM HAYWARD
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MIRIAM HAYWARD, in the matter of:

LUCA UTZERI

A 087 211 857

San Francisco, California

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Suzanne Carr, Transcriber
Free State Reporting, Inc.

March 4, 2011
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.