U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PATEL, PRAKASHCHANDRA R... **A 200-661-745**

Date of this notice: 5/8/2015

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:
Creppy, Michael J.
Mann, Ana
Mullane, Hugh G.

Userteam: Docket

File: A200 661 745 – Memphis, TN

Date: MAY - 8 2015

In re: PRAKASHCHANDRA RAMESHCHANDRA PATEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bhavya Chaudhary, Esquire

ON BEHALF OF DHS: Jamee E. Comans
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Termination; reinstatement of status

The respondent, a native and citizen of India, appeals from the Immigration Judge's decision dated March 8, 2013, finding that the Department of Homeland Security (DHS) demonstrated by clear and convincing evidence that the respondent is removable as an alien who failed to comply with the conditions of his change of status from an F-1 nonimmigrant student to an H-1B temporary worker under sections 237(a)(1)(C)(i) and 248(a) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1227(a)(1)(C)(i), 1258(a). The appeal will be dismissed.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all remaining issues, including issues of law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the Immigration Judge's decision in this case. The Immigration Judge correctly determined that DHS established that the respondent failed to maintain his H-1B nonimmigrant status or to comply with the conditions of his change of status because he worked between November 2010 and January 2011 as a store clerk at the gas station while his H-1B visa was approved for the position of business manager. The respondent entered the United States on May 29, 2007, as an F-1 nonimmigrant student, but in October 2010, the respondent changed his status from an F-1 nonimmigrant to an H-1B temporary employee. The petition was filed by the owner of Rajnil, Inc. (Tobacco for Less), Mr. Hitendrakumar Patel, on behalf of the respondent (I.J. at 6; Exh. 3H, Form I-129). The respondent's employer stated that the respondent's duties as a "Business Manager" would be to prepare financial information for tax returns, financial statements, business activity reports, financial forecasts, annual budgets, and reports required by regulatory agencies (I.J. at 6-9; Exh. 3J). The letter further indicated that the respondent would develop and maintain relationships with banking, insurance, and accounting personnel to facilitate financial activities and he would research property and business investment

opportunities (Exh. 3J). In contrast, on January 18, 2011 and January 19, 2011, the respondent was found working as a gas station clerk (I.J. at 7-10; Exhs. 2A and 3WW).

The respondent argues that his primary employment activities were management duties and his activities performing clerk duties were minimal and did not violate his H-1B visa status (Respondent's Brief. at 5-9). During questioning by DHS agents, however, the respondent admitted that he had been working as a store clerk for the past 2 months. He stated that once the other locations were fully operational, he would assume more management responsibilities (I.J. at 12; Exh. 2A). He also admitted that he worked 5 to 6 hours per week as a clerk, and additionally stated that he helped out as clerk between 6:00 and 10:00 p.m. (I.J. at 6). The respondent's statements, together with the DHS agents' observations, reflect that he was not primarily working in the H-1B visa specialty occupation, of business manager or operations manager, for which the petitioning employer, sought and obtained the H-1B visa approval. The documents he submitted to demonstrate his management responsibilities, such as sales and profit reports, agreements with vendors, and spreadsheet reports on products sold, fail to overcome the conclusion that he spent significant time working as a clerk (Exh. 2A).

We give little weight to the respondent's claim that, once the company's other locations were fully operational, he would resume his management duties. His argument is belied by the evidence that there were three locations in 2010 and that in 2012 there continued to be only three locations (I.J. at 12; Exh. 3H at 4). Further, the respondent's Form I-129 petition indicated that Ranjil, Inc. employed just two people for three business operations before hiring the respondent; therefore, we agree with the Immigration Judge that it is reasonable to conclude that the respondent was expected to work as a clerk for a substantial amount of time in order to keep the businesses running (I.J. at 12; Exh. 3H at 4). The number of employees also did not change during the relevant period (I.J. at 12).

On this record, we agree with the Immigration Judge's determination that the respondent failed to maintain his H-1B status, working in a specialty occupation as a business manager, and the DHS met its burden of proof to demonstrate by clear and convincing evidence that the respondent is removable. *See* 8 C.F.R. § 214.2(h)(1)(ii)(B).

We are not persuaded by the respondent's argument that the Immigration Judge erred in finding that the respondent violated his status by working for Jayshrijee, Inc. (dba Glen's Grocery), because the factual allegation was not made on the Notice to Appear ("NTA") (Resp. Br. at 14; I.J. at 13). The NTA charges that the respondent is subject to removal as alien who did not maintain or comply with the conditions of the nonimmigrant status, as an H-1B nonimmigrant temporary employee, under section 237(a)(1)(C)(i) of the Act. Working for an employer that is not the petitioner of the respondent's approved H-1B visa is a violation of his status. *See Matter of Valbuena*, 15 I&N Dec. 404, (BIA 1975). The respondent submitted various documents demonstrating that he worked for Jayshrijee, Inc., who is not the petitioning employer, and did not demonstrate that his work there was a short term placement. The record does not contain an approved H-1B visa application filed by Jayshrijee, Inc. Thus, the Immigration Judge properly concluded that the respondent violated the conditions of his status by working for an unapproved employer (I.J. at 13). *See* 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

The Immigration Judge's primary finding that the respondent violated his status as an H-1B nonimmigrant temporary worker by working as a clerk instead of a manager is correct and dispositive (I.J. at 12-13). Thus, even if the Immigration Judge's alternative finding that the respondent violated his status as an H-1B nonimmigrant temporary worker by working for a non-petitioning employer, was outside the scope of the NTA, it did not prejudice the respondent as it would not change the result. *See Matter of Santos*, 19 I&N Dec. 105 (BIA 1984) (an alien in deportation proceedings has been denied a fair hearing only if prejudiced by some deficiency so as to deprive the alien of due process).

We affirm the Immigration Judge's denial of the respondent's motion to suppress the Form I-213, Record of Deportable/Inadmissible Alien and other documents and statements resulting from his detention and questioning.[1] The exclusionary rule does not generally apply in immigration proceedings, where the issue is "the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers." *INS v. Lopez-Mendoza*, 368 U.S. 1032, 1051 (1984). Evidence may be excluded, in order to protect the Fifth Amendment right to due process, if obtained as the result of "egregious" violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. *INS v. Lopez-Mendoza, supra*, at 1050-51; *cf. Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002) ("absent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability").

The respondent claimed to have been placed under duress during his questioning, as a result of the DHS agent's actions. On January 18, 2011, the DHS agents visited the respondent's business address and observed the respondent. They returned the next day, questioned him at the worksite, detained and transported him to immigration offices, questioned him further, then served him with the NTA. The respondent stated that he was detained at 11:00 a.m. and arrived home at 4:00 p.m.

We agree with the Immigration Judge that respondent did not establish a prima facie case that his statements were obtained through coercion and duress in violation of the Fifth Amendment (I.J. Feb. 6, 2012, at 6; Exh. 8, at 6; Exh. 2A). *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (observing that "'[o]ne who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence'"). There is also no evidence that the actions taken undermined the reliability of the evidence in dispute. Therefore, the respondent's admissions contained in the I-213 and other evidence and documents gained as a result of the search and questioning by the DHS officials are admissible (Exh. 8 at 6).

[1] The Immigration Judge issued a separate decision on the motion to suppress on February 6, 2012 (Exh. 8 at 4-6).

The Immigration Judge also correctly rejected the respondent's argument that the statements should be excluded because the DHS agents violated regulations requiring notice to the alien of his rights after arrest (Resp. Br. at 18-19; Exh. 8, at 6-7). *See* 8 C.F.R. § 287.3(c). Until an alien who is arrested without a warrant is placed in formal proceedings by the filing of a NTA (Form I-862), immigration officers are not required to advise the alien that he or she has a right to counsel and that any statements made during interrogation can subsequently be used against the alien. *See Matter of E-R M-F- & A-S-M-*, 25 I&N Dec. 580, 584 (BIA 2011). In this case, the NTA had not been filed when the respondent was questioned.

Similarly, we reject the respondent's argument that the statements should be excluded because the DHS agents violated 8 C.F.R. § 287.3(a), which provides that an alien arrested without a warrant will be examined by an officer other than the arresting officer unless no other qualified officer is readily available (Resp. Br. at 20). The applicable DHS regulations expressly provide that they "do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." 8 C.F.R. § 287.12. Thus, DHS regulations are not enforceable by the respondent to seek termination of proceedings or to suppress evidence. *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980) (requiring a demonstration of prejudice in order to exclude evidence obtained in violation of a regulation). The respondent did not demonstrate that he was prejudiced by having been questioned and arrested by the same officer.

Accordingly, we affirm the Immigration Judge's decision, and the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties

for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

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