**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*

**Trupiano, Kimberly Jo**
**Trupiano Law P.C.**
**5525 South 900 East, Suite 110**
**Salt Lake City, UT 84117**

**DHS/ICE Office of Chief Counsel - SLC**
**2975 Decker Lake Dr. Stop C**
**West Valley City, UT 84119**

**Name: TAUFALELE, TENISINI**

**A 200-673-398**

**Date of this notice: 2/5/2016**

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:
Pauley, Roger

Userteam: Docket

File: A200 673 398 – West Valley City, UT Date: FEB - 5 2016

In re: TENISINI TAUFALELE a.k.a. Halatoa Fakatoumafi a.k.a. Halatoa Moana Fakutoumafi

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kimberly J. Trupiano, 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 (conceded)

APPLICATION: Adjustment of status; voluntary departure; remand

The respondent appeals from the Immigration Judge's December 16, 2014, decision, denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), for failure to establish prima facie eligibility, and denying his alternative application for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), based on insufficient evidence of good moral character. During the pendency of this appeal, the respondent filed a motion, styled as a motion to reopen, alleging ineffective assistance of counsel and requesting remand of the record. The Department of Homeland Security (DHS) has not responded. The record will be remanded for further proceedings consistent with this decision.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issued de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The following facts are not in dispute. The respondent, a native and citizen of Tonga, entered the United States as a nonimmigrant visitor and remained longer than authorized (I.J. at 2-3; Tr. at 4; Exh. 1). He is the beneficiary of an approved Alien Relative Petition (Form I-130) filed on his behalf by his United States citizen wife (I.J. at 3; Tr. at 4). At a hearing held in 2013, the respondent indicated his intent to apply for adjustment of status pursuant to section 245(a) of the Act based on the approved visa petition (I.J. at 3; Tr. at 11). The Immigration Judge scheduled a final hearing on the respondent's adjustment application for September 15, 2014 (I.J. at 3; Tr. at 14-15, 17).

At the respondent's September 15, 2014, hearing, his then-counsel requested a continuance because the adjustment application was incomplete: the fingerprints and medical examination had expired, and the affidavit of support for the sponsor and joint sponsor were deficient (I.J. at 3: Tr. at 17-20). *See* sections 212(a)(1), (2), and (4) of the Act, 8 U.S.C. §§ 1152(a)(1), (2), (4) (outlining health-related, criminal, and public charge grounds of inadmissibility).

Over the DHS's objection, the Immigration Judge continued the respondent's case until December 16, 2014 (I.J. at 4; Tr. 19, 21). However, at the December 2014 hearing, problems persisted with the sufficiency of the affidavits of support (I.J. at 4; Tr. at 23-27). The Immigration Judge declined to further continue proceedings and instead concluded that the respondent had not established his statutory eligibility for adjustment of status (I.J. at 4; Tr. at 27). The Immigration Judge also denied the respondent's alternate request for voluntary departure on good moral character grounds (I.J. at 8). *See* section 240B(b)(1)(B) of the Act; *see also* section 101(f) of the Act, 8 U.S.C. § 1101(f) (defining good moral character).

On appeal, the respondent alleges that his inability to demonstrate prima facie eligibility for adjustment of status and voluntary departure was due to the ineffective assistance of his prior attorney (Resp. Brief at 2; Resp. Motion to Reopen at 2-5). This is essentially a request for remand, with requirements similar to those for reopening. *See* 8 C.F.R. § 1003.2(c); *Matter of Coelho*, 20 I&N Dec. 464, 471-73 (BIA 1992). Generally, such a motion will not be granted unless it states new and material facts, is supported by affidavits or other evidentiary material, and establishes a prima facie case of statutory and discretionary eligibility for the underlying relief sought. *See* 8 C.F.R. § 1003.23(b)(3); *see also INS v. Doherty*, 502 U.S. 314 (1992); *Maatougui v. Holder*, 738 F.3d 1230, 1240-41 (10th Cir. 2013) (confirming that a motion to reopen should be supported by new evidence establishing a prima facie claim to relief); *Osei v. INS*, 305 F.3d 1205, 1208-09 (10th Cir. 2002); *Matter of Coelho*, *supra*.

In support of remand, the respondent has complied with the procedural requirements articulated in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *see also Osei v. INS*, *supra*, at 1209 n.2. The respondent filed a state bar complaint against his former attorney, advised the former attorney of the allegations against him, and submitted a motion supported by an affidavit detailing how the attorney's performance was deficient and impacted the respondent's case.

Specifically, the respondent alleges that his former counsel did not prepare him for the hearing, did not request that his wife file her taxes, improperly recorded information on the affidavit of support, and did not ensure that the joint sponsor's affidavit was duly executed or supported by proof of his United States citizenship, resulting in the Immigration Judge's conclusion that the respondent could not overcome the public charge ground in qualifying for adjustment of status (Resp. Motion to Reopen at 7-8, Tabs 41-46; Tr. at 17-18, 20, 24-27). *See* section 212(a)(4) of the Act; section 213A of the Act, 8 U.S.C. § 1183a (outlining the statutory requirements for the affidavit of support); 8 C.F.R. §§ 213a.2(a)(1)(i)(A), (ii), (v), (b)(1), (c)(1)(i)(C), (c)(2), (ii) (for the various requirements related to proper execution of the affidavit of support, who may file the affidavit of support, and the evidence required to demonstrate sufficient income in support of the affidavit). With his motion, the respondent also included a letter from an accountant stating that the accountant is working with the respondent's wife to file her back taxes (Resp. Motion to Reopen at Tab 33). The respondent also alleges he was prejudiced when his attorney did not prepare him for questioning about his 2010 arrest, and that numerous family members would have testified on his behalf as to his good moral character if they had been asked to do so—factors relevant to the Immigration Judge's denial of voluntary departure for lack of good moral character (Resp. Motion to Reopen at Tabs 5, 6, 7, 10, 12, 14, 16, 18, 20, 22; I.J. at 6-8; Tr. at 27-51). *See* section 240B(b)(1)(B) of the Act.

We find that remand is warranted in the interests of justice. The respondent has demonstrated that he was prejudiced by his former counsel's lack of preparation and communication with the respondent. *See* 8 C.F.R. §§ 1003.102(o), (r) (requiring an attorney before the Immigration Court to adequately prepare for all proceedings and maintain communication with the respondent); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of B-B-*, 22 I&N Dec. 309, 311 (BIA 1998); *Matter of Lozada*, *supra*, at 640; *see also Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008) (requiring the respondent to demonstrate prejudice in order to establish ineffective assistance of counsel warranting remand). Here, for instance, the respondent's prior counsel: (1) did not adequately inform him of the documents required to present a sufficient affidavit of support even after certain deficiencies were identified by the Immigration Judge; (2) did not prepare him for questions he might be asked about his criminal history in qualifying for voluntary departure; and (3) openly acknowledged the affidavit of support was deficient (Tr. at 17-21, 25-27; Resp. Motion to Reopen at 31-46). Moreover, prior counsel proffered no persuasive evidence to rebut the ineffective assistance claim, even though the attorney was notified of the respondent's allegations. Many of the identified errors in prior counsel's performance have been rectified by current counsel. Notwithstanding the foregoing, we express no opinion as to the ultimate merits of the respondent's applications for relief. In light of our disposition of this matter, we decline to address the respondent's assertions on appeal that the record, as it was constituted before the Immigration Judge, supported a grant of adjustment of status or voluntary departure.

Upon remand, the parties will have an opportunity to supplement the record with any documentation or testimony they may choose to present relevant to the respondent's applications for relief. However, we remind the respondent and his counsel that he is responsible for presenting a complete application for relief supported by the requisite documentary evidence. Failure to follow this instruction and any directives issued by the Immigration Judge may result in a finding that he is statutorily ineligible for any requested forms of relief. *See*, *e.g.*, *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010).

Accordingly, the following order is entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
WEST VALLEY CITY, UTAH

File: A200-673-398 December 16, 2014

In the Matter of

| | | |
|---|---|---|
| TENISINI TAUFALELE | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended in that after admission as a non-immigrant, the respondent remained in the United States for a time longer than permitted in violation of the Act or any other law of the United States.

APPLICATIONS: Section 245 of the Act - adjustment of status; Section 240B of the Act - voluntary departure.

ON BEHALF OF RESPONDENT: GAGE HERBST, Esquire
660 South 200 East, Suite 402
Salt Lake City, Utah 84111

ON BEHALF OF DHS: MINDY E. HOEPPNER, Assistant Chief Counsel
2975 South Decker Lake Drive
West Valley City, Utah 84119

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 35-year-old married male native and citizen of Tonga. The Department of Homeland Security issued a Notice to Appear dated June 22, 2010,

alleging that the respondent was admitted to the United States at Honolulu, Hawaii, on or about March 30, 2007, as a nonimmigrant B-2 visitor with authorization to remain in the United States for a temporary period not to exceed September 29, 2007. Homeland Security further alleged that the respondent remained in the United States beyond September 29, 2007, without authorization from the Immigration and Naturalization Service or its successor, the Department of Homeland Security. Homeland Security charged the respondent with removability under Section 237(a)(1)(B) of the Act.

The respondent, through counsel, admitted all of the factual allegations set forth in the Notice to Appear. He, therefore, agreed that he was permitted to remain in the United States for just six months as a visitor in Hawaii. Later the Court received a copy of the visa that the respondent used to enter the United States and it specifically limited the purpose of the respondent's visit to the United States for participation in a canoeing event in Hawaii. Respondent agreed that he came to the United States to participate in a canoe race, but decided that he did not want to go back to Tonga and wanted to stay inside the United States. He testified that his cousin was in Kona, Hawaii, where the race took place. The respondent decided to relocate to Utah and transported his cousin's wallet with him from Hawaii to Utah. The wallet included the cousin's identity card. When the respondent was later arrested in 2010, police found one, and only one, identity document on the respondent. Years after he took the identity document from Hawaii, the police found the cousin's identity document on the respondent's person. The respondent asserted that he accidentally took the cousin's wallet when he left Hawaii in 2007 for Utah. He kept the wallet for years and asserted that he used it to store his own cash and never returned the identity card to his cousin in Hawaii because he did not have his cousin's address.

The respondent was charged with removability under Section 237(a)(1)(B) of the

Act. Respondent conceded that charge. Therefore, the Immigration Judge sustained the charge of removability. The respondent designated Tonga as the country of removal and Tonga was directed.

After the respondent relocated to Utah, the respondent married a citizen of the United States. Before marrying the citizen, respondent had to have first divorced his Tongan wife. Respondent had left behind in Tonga his wife and two children, relocated to Utah, sired a child with his newfound relationship in Utah and was not able to marry this second wife until he first procured a divorce from his first wife. After the respondent achieved that, the respondent's U.S. citizen wife filed a Form I-130 petition, which was later approved.

The respondent was placed in Immigration Court removal proceedings in 2010 following his arrest at a bar in Salt Lake City, Utah. Respondent was accused of sexually assaulting a number of women at the bar. Those charges were dismissed in State Court, but the accusations resulted in U.S. Immigration finding the respondent inside the United States having overstayed his tourist visa for years.

In these removal proceedings the respondent sought adjustment of status under Section 245 of the Act and voluntary departure in the alternative. The respondent prepared his adjustment of status application on Form I-485 in 2011 and sent a copy of it to the Texas Service Center pursuant to the biometrics instructions. The respondent's U.S. citizen spouse's petition for the respondent was approved March 30, 2011, over three and a half years ago. On September 18, 2013, the Court scheduled the matter for a hearing on the adjustment of status application September 15, 2014. Therefore, the respondent had over three years to prepare and submit all documents necessary for adjustment of status inside the United States following approval of the wife's I-130 petition. This would include the wife's affidavit of support as she is the sponsor *for the*

adjustment of status application and, in the instant matter, a cosponsor's affidavit of support. The respondent was given notice of one year that the application would be adjudicated September 15, 2014.

Although the respondent had years to prepare to present his adjustment of status application, the respondent was not prepared on September 15, 2014, even though he had a year's notice that the Court would be hearing the case that afternoon. The respondent's fingerprints had expired, he needed to submit new medicals, the affidavit of support was insufficient and the joint sponsor did not have the income tax returns filed for the cosponsor's affidavit of support. The respondent requested a continuance so that he could have additional time to prepare. At that point because the respondent's case was four years old and because the respondent had ample opportunity to meet the documentary requirements for adjustment of status, Homeland Security opposed any further continuances. Nevertheless, over Homeland Security's opposition the Court granted the respondent's motion to continue and gave the respondent an additional three months to prepare. The matter was scheduled for adjustment of status merits December 16, 2014.

On that date respondent still did not have sufficient documentation for the wife's affidavit of support or for the cosponsor's affidavit of support. The respondent requested a continuance so that he could bring in documents that would be sufficient for the affidavits of support. Homeland Security again opposed a continuance and because the respondent had been given years and multiple continuances to prepare, the motion was denied.

Because the affidavit of support from the sponsor and cosponsor are insufficient, the Court is unable to grant adjustment of status.

Respondent applied for voluntary departure in the alternative. More than 30 days

following a Master Calendar for which the merits date was set has elapsed. Therefore, we are at the conclusion of proceedings for voluntary departure purposes. Pre-conclusion voluntary departure is only available at this stage if the Department of Homeland Security stipulates to pre-conclusion voluntary departure. The Department of Homeland Security was not in a position to do that. Therefore, at the conclusion of these proceedings, only conclusion voluntary departure was available.

To qualify for voluntary departure under Section 240B of the Act, respondent must establish that he has been physically present in the United States for a period of at least one year immediately preceding the date that the Notice to Appear was served. Respondent must also establish that he has been a person of good moral character for at least five years immediately preceding the application. He must establish with clear and convincing evidence that he has the means to depart the United States and intends to do so. He shall be required to post a voluntary departure bond. He must be in possession of a travel document that will assure his lawful re-entry into his home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the respondent's prior Immigration history, the length of his residency inside the United States and the extent of his family, business and societal ties to the United States.

In the instant matter the respondent testified persuasively about his intention to depart the United States and his ability to do so. He also persuaded the Court through his testimony that he would be able to post a voluntary departure bond.

GOOD MORAL CHARACTER

Conclusion voluntary departure requires that the respondent has been a person of good moral character for at least five years immediately preceding the application.

Therefore, the respondent must establish good moral character from December of 2009 to the present. The Court is unable to find that the respondent has met that burden.

The Court refers the reader of this decision to Exhibits 2, 3, 5 and 8 in the Record of Proceedings. These documents include police reports and conviction records. In the relatively short time that the respondent has been inside the United States, he has been arrested more than once. In 2010 the respondent was a regular patron of a bar in Salt Lake City. Respondent testified that he was a regular patron of this bar. He was accused of sexually assaulting a number of women. Those State Court charges were dropped.

However, the Court notes that when the respondent was arrested at the bar, he was found to have one and only one identity document on his person, a Hawaii identification card naming someone else. The respondent testified that that person is his cousin. He attempted to persuade the Court that he obtained that identity document by accident when traveling from Hawaii to Utah in 2007. Respondent first arrived in the United States in Kona, Hawaii, to participate in a canoe race. There was his cousin in Kona. Respondent asserted that when he was about to travel from Hawaii to Utah, his cousin's wallet was for some reason on his luggage and the respondent accidentally took the wallet and traveled with the identity card from Hawaii to Utah years ago in 2007.

The respondent has had years to return that identity document to Hawaii and to the bearer of that document. Respondent asserted that he was unable to do so for years because he did not have his cousin's address. The respondent asserted that he did not use the document to persuade others that that was his identity, that he happened to have the document on his person when he was arrested at the bar. The Court was not persuaded by this testimony. Respondent had on his person some*one*

else's identity document. He possessed that document for years at a time when he did not have permission from the U.S. Government to be inside the United States. Respondent's decision to keep someone else's document, a document that was generated in Hawaii, for years is a negative factor in assessing the respondent's good moral character from 2009 to the present.

Later in 2012 the respondent was driving from the city of Murray, Utah, to the respondent's home in a different city in Utah. The respondent had alcohol in his system. He planned to drive without a license on a freeway from Murray, Utah, after visiting the bar to his home in South Jordan, Utah. This misconduct endangered the lives and property of other people. Fortunately on this occasion the Utah highway patrol encountered the respondent on a freeway onramp attempting to enter a high-speed freeway. He was charged with driving with alcohol in his system and ultimately convicted by his plea of guilty to impaired driving. This misconduct and conviction is another negative factor in assessing good moral character.

Additionally, the respondent at a time when he was married to a U.S. citizen filed taxes as a single person. That way he would not be responsible for the back taxes that his wife owed to the U.S. Government. If he had filed married filing jointly, then he may have been responsible to the U.S. Government for those back taxes. This is another negative factor.

The Court did consider positive factors. The respondent abandoned his children in Tonga to establish a new life in the United States without permission from the U.S. Government. Nevertheless, he testified that he has sent money to his two children in Tonga for their education and food. This is a positive factor. He also currently works and supports his third child that he sired inside the United States. This is also a positive factor. Respondent also currently works and is able to support his children with his

current employment. This is also a positive factor.

Considering the positive and negative factors and the totality of circumstances, the Court is unable to find that the respondent is has been a person of good moral character inside the United States for the last five years. Therefore, the Court is unable to grant conclusion voluntary departure.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for adjustment of status under Section 245 of the Act be denied.

IT IS HEREBY ORDERED that the respondent's application for voluntary departure under Section 240B of the Act be denied.

IT IS HEREBY ORDERED that the respondent be removed from the United States and deported to Tonga on the charge contained in the Notice to Appear.

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

DAVID C. ANDERSON
Immigration Judge

//s//

Immigration Judge DAVID C. ANDERSON

andersda on March 20, 2015 at 12:37 PM GMT