U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Chief Clerk

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Falls Church, Virginia 20530

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Name: GAMANGA, NYAKEH ANSUMANA

A 077-615-717

Date of this Notice: 4/29/2014

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:
Miller, Neil P.

File: A077 615 717 – Dallas, TX

Date: APR 29 2014

In re: NYAKEH ANSUMANA GAMANGA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Garry L. Davis, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Sierra Leone, appeals from the Immigration Judge's decision dated June 27, 2012, denying his motion to reopen. During the pendency of the appeal, the respondent presented additional evidence in support of his motion. The Department of Homeland Security has not responded to the appeal. The proceedings will be reopened and the record will be remanded.

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

On January 10, 2012, the respondent filed a motion to reopen with the Immigration Judge to apply for adjustment of status based on a pending Form I-130, Petition for Alien Relative, filed on the respondent's behalf by his United States citizen wife. The Immigration Judge denied the motion based on his conclusion that the respondent failed to demonstrate his prima facie eligibility for adjustment of status. *See, e.g., INS v. Doherty*, 502 U.S. 314, 323 (1992) (a motion to reopen to apply for relief may be denied when the alien has not demonstrated prima facie eligibility for the relief sought). Specifically, the Immigration Judge found that the respondent did not demonstrate that he was not inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), because he did not provide any evidence that his conviction for possession of marijuana involved 30 grams or less of marijuana (I.J. at 3-5, June 27, 2012). *See* section 212(h) of the Act.

Based on the evidence provided to the Immigration Judge, we are not persuaded that he erred in denying the respondent's motion to reopen. However, during the pendency of this appeal, the respondent provided evidence indicating that his conviction for possession of marijuana involved 30 grams or less of marijuana (Respondent's Supp. Br., Tab A). He has also included evidence showing that the visa petition filed on his behalf has been approved, as well as copies of all relevant applications for relief (Respondent's Supp. Br., Tabs B-E). Because the respondent appears to be prima facie eligible for adjustment of status in conjunction with a waiver of inadmissibility, we conclude that reopening is warranted. Accordingly, the instant proceedings will be reopened and the record will be remanded to the Immigration Judge for consideration of *the respondent's* applications for relief. The following order shall be entered.

ORDER: The respondent's motion to reopen is granted 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

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

DAVIS & ASSOCIATES
DAVIS, GARRY
P.O. BOX 810684
DALLAS, TX 75381

IN THE MATTER OF
GAMANGA, NYAKEH ANSUMANA

FILE A 077-615-717 DATE: Jun 29, 2012

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: AGNELLO, MARY F.
125 E. HWY 114, STE 500
IRVING, TX, 75062

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	
	)	
GAMANGA, Nyakeh Ansynaba	)	A077-615-717
	)	
	)	
RESPONDENT	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States

APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT

Garry L. Davis, Esq.
Davis & Associates
P.O. Box 810684
Dallas, TX 75381

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY

Mary Agnello, Esq.
Asst. Chief Counsel – ICE
125 E. John Carpenter Freeway, Ste. 500
Irving, TX 75062

WRITTEN DECISION OF THE IMMIGRATION JUDGE

FACTUAL BACKGROUND

The Respondent is a male, native and citizen of Sierra Leone. Exhibit 1. On or about July 22, 2008 he was admitted into the United States at Dallas, Texas as a nonimmigrant B2 visa holder, with authorization to remain in the United States for a temporary period not to exceed January 21, 2009. *Id.* He remained in the United States beyond January 21, 2009 without authorization from the Department of Homeland Security (DHS or the Government). *Id.*

On December 6, 2010 the DHS served the Respondent with a Notice to Appear (NTA), charging him with removability under INA § 237(a)(1)(B) as an alien who after admission as a nonimmigrant has remained in the United States for a time longer than permitted. *Id.*

At a hearing on April 4, 2011 the Respondent appeared before the Court and admitted all of the allegations and conceded the charge. The Court concluded that removability had been established by clear and convincing evidence. The Respondent designated his country of removal as Sierra Leone.

At a hearing on May 16, 2011 the Respondent articulated his intent to apply for adjustment of status, based on a pending I-130 Petition filed by his former spouse. At this hearing the Respondent admitted to the Court that he was convicted in 2009 for the possession of marijuana. The Court noted that the Respondent is inadmissible under INA § 212(a)(2)(A)(i)(II), as an alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of [...] a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance. The Court instructed the Respondent and the Respondent's former counsel to provide, at the Respondent's next hearing, documentation of the amount of marijuana the Respondent was convicted of possessing. If the Respondent could demonstrate he was convicted of possessing 30 grams or less of marijuana, he could demonstrate his statutory eligibility for a waiver of inadmissibility under INA § 212(h).

At the Respondent's next hearing on October 31, 2011 the Court admitted into the record the Incident Report and Inmate Intake Form for the Respondent's arrest. The

Inmate Intake Form indicates that the Respondent was convicted of the possession of marijuana, less than 2 ounces. The Respondent also stated to the Court on the record that he was convicted for the possession of marijuana, less than two ounces. In addition, the Respondent stated to the Court that he and his spouse had divorced.

At the hearing on October 31, 2011 the Court granted the Respondent voluntary departure, and ordered that the Respondent was required to depart the United States by February 28, 2012.

On January 10, 2012 the Respondent, through present counsel, filed the present Motion to Reopen, requesting that the Court reopen his case so he may apply for adjustment of status based upon a pending I-130 Petition filed by his current spouse.

On February 10, 2012 the Government submitted its Opposition to the Respondent's Motion.

STATEMENT OF THE LAW & ANALYSIS

The decision to grant or deny a motion to reopen is within the discretion of the Immigration Judge. 8 C.F.R. § 1003.23(b)(1)(iv); *see INS v. Doherty*, 502 U.S. 314, 322 (1992). A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application and all supporting documents. *Id.* Furthermore, a motion to reopen will not be granted unless the Respondent establishes a *prima facie* case of eligibility for the underlying relief. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); *INS v. Doherty*, 502 U.S. 314 (1992).

Here, the Respondent's counsel argues to the Court that the Respondent is *prima facie* eligible for adjustment of status. The Court does not agree. INA § 245(a) provides that the Court may, in its discretion, adjust the status of an alien to that of a permanent resident if, among other things, the alien is admissible to the United States for permanent residence. The Court noted on the record at the hearing on May 16, 2011 that the Respondent is inadmissible under INA § 212(a)(2)(A)(i)(II). The Court even advised the Respondent and the Respondent's former counsel to submit evidence showing the amount of marijuana the Respondent was convicted of possessing. If that documentation were to show that the Respondent was convicted of possessing 30 grams or less of marijuana, then he would be *prima facie* eligible for a waiver of inadmissibility under INA § 212(h). As such, the Court is troubled by the Respondent's counsel's statement in the present Motion that the Respondent is admissible. Even a cursory review of the record would indicate that the Respondent is inadmissible under INA § 212(a)(2)(A)(i)(II).

The Respondent and his counsel have yet to file any evidence indicating that the amount of marijuana that the Respondent was convicted of possessing was 30 grams or less. The only evidence included in the record that indicates the amount of marijuana the that Respondent possessed is the Inmate Intake Form, which provides that the Respondent was convicted of the possession of marijuana, less than 2 ounces, and the Respondent's statement to the Court that he was convicted of the possession of marijuana, less than two ounces.

Two ounces equals 56.699 grams. Thus, the Court has no way of telling whether the Respondent was convicted for possessing 30 grams or less or marijuana. The

Respondent has not demonstrated his *prima facie* eligibility for a waiver under INA § 212(h). Accordingly, the Respondent remains inadmissible under INA 212(a)(2)(A)(i)(II) and is statutorily ineligible to adjust his status under INA § 245(a).

Finally, the Court notes that this case does not present the exceptional circumstances warranting a *sua sponte* reopening of the proceedings. *See Matter of G-D*, 22 I.& N. Dec. 1132 (B.I.A. 1999); *Matter of J-J-*, 21 I. & N. Dec. 976 (B.I.A. 1997) (holding that the Court has discretion to reopen a case *sua sponte*; however, that discretion is limited to cases where exceptional circumstances are demonstrated).

CONCLUSION

The Court will not reopen the Respondent's case to allow him to apply for adjustment of status, as he is statutorily ineligible to adjust his status.

The following Order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED**.

This 27 day of June, 2012

Deitrich H. Sims
United States Immigration Judge