U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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Davis & Associates
PO Box 794284
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DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: BUTRAD, KEMANIT

A 205-701-814

Date of this notice: 10/17/2016

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:
Grant, Edward R.

Userteam: Docket

File: A205 701 814 – Dallas, TX

Date: OCT 17 2016

In re: KEMANIT BUTRAD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Garry L. Davis, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Thailand, appeared before an Immigration Judge on November 6, 2015, and she agreed to voluntarily depart the United States by March 7, 2016. On February 3, 2016, the respondent filed a timely motion to reopen, and she appeals from the Immigration Judge's decision dated March 9, 2016, denying her motion. The record will be remanded.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

On appeal, the respondent states that she married a United States citizen on July 3, 2014, and her spouse filed a visa petition (Form I-130) on her behalf on February 1, 2016, which is pending before the United States Citizenship and Immigration Services (USCIS). She argues that her marriage is bona fide, and the Immigration Judge erred in denying her motion to reopen to apply for adjustment of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. *See Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009); *Matter of Velarde,* 23 I&N Dec. 253 (BIA 2002) (providing the criteria for when an Immigration Judge may, in the exercise of discretion, grant a properly filed motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of proceedings, notwithstanding the pendency of a visa petition).

The Immigration Judge denied the respondent's motion in the exercise of discretion. *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974); *Matter of Arai,* 13 I&N Dec. 494 (BIA 1970) (discussing discretionary consideration pertaining to adjustment of status applications). The USCIS on August 17, 2015, denied a visa petition that the respondent's spouse filed on her behalf. Thereafter, the respondent and her spouse appeared before the Immigration Judge on November 6, 2015, and she agreed to depart the United States voluntarily within 120 days in exchange for the government withholding adverse information regarding the respondent's employment in the United States (I.J. at 1-2). The Immigration Judge found significant that the respondent did not request a continuance for her spouse to file a second visa petition on her behalf, and she willing accepted a 120-day period of pre-hearing voluntary departure (I.J. at 1-2).

The Immigration Judge then determined the respondent should be held to her agreement, and he declined, in the exercise of discretion, to reopen these proceedings.

However, the USCIS did not deny the visa petition because the respondent's marriage was lacked bona fides. Rather, the USCIS denied the petition as abandoned, inasmuch as her spouse did not appear for a required interview. In addition, in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board set forth several factors for determining whether to continue a proceeding based on a pending visa petition. As a factor, the Board included the lack of opposition from the DHS, and we noted that an alien's unopposed motion for a continuance to await the adjudication of a pending family-based visa petition should generally be granted if approval of the petition would render the alien prima facie eligible for adjustment of status. *Id.* In light of the foregoing, the record will be remanded to the Immigration Judge to reconsider his decision while taking into account the above factors.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

Edward R. Grant

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

Davis & Associates
Davis, Garry L
PO Box 794284
Dallas, TX 75379

IN THE MATTER OF
BUTRAD, KEMANIT

FILE A 205-701-814 DATE: Mar 10, 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ 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
5107 Leesburg Pike, Suite 2000
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., SUITE 1060
DALLAS, TX 75242

X OTHER: See attached order

COURT CLERK
IMMIGRATION COURT

FF

CC: GRAHAM, HEIDI
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:	)	
	)	
BUTRAD, Kemanit	)	A 205-701-814
	)	
RESPONDENT	)	

CHARGE: Section 237(a)(1)(B)(i) of the Immigration and Nationality Act (INA or 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 RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Garry L. Davis	Heidi Graham

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Respondent filed the present motion to reopen to allow proceedings to continue pending a U.S. Customs and Immigration Services (USCIS) adjudication of a second I-130 petition filed by Respondent's spouse. The Department of Homeland Security (DHS) has not filed a response.

The Court will deny this motion as Respondent states no new material facts that will be proven at a hearing if the motion is granted. *See* 8 C.F.R. § 1003.23(b)(3). USCIS denied the first I-130 petition. Respondent testified that she had argued with her husband and then moved to a different city after the petition had been filed. The I-130 was denied in August. At a hearing in November, Respondent's husband was present but Respondent did not request a continuance for the filing of a second I-130. At that time the parties reached a settlement for 120 days voluntary departure. Respondent bargained for that result after the government indicated it had adverse

information about the nature of Respondent's employment in the United States. The government indicated it would withhold the adverse information if Respondent accepted voluntary departure. Respondent was given an opportunity to consult with her attorney before deciding to accept the government's offer. Respondent could have, but did not, reject the government's offer of voluntary departure and instead request a continuance to allow her husband to file a second petition. Having gained the benefit of the 120 day delay in her case, Respondent now wants to change her mind. A motion to reopen is not for the purpose of allowing a Respondent to change their mind about a settlement agreement. Notwithstanding the subsequent filing of a second I-130, the case is essentially in the same posture it was at the time of the last hearing. It would be unfair to the government to allow the Respondent, after having consumed the 120 benefit offered by the government, to essentially abrogate the settlement unilaterally.[1]

Further, there is an independent reason to deny the request. Respondent has already been permitted to stay until the first I-130 was adjudicated. It would be speculative as to whether a second I-130 might be approved, and Respondent could endlessly forestall removal if she were allowed to remain merely upon the filing of a subsequent petition after the denial of the initial petition. The Board has never indicated that the mere filing of a second petition following the denial of a prior petition would support a motion to continue or a motion to reopen.

The Court declines to reopen *sua sponte* as this case does not present an exceptional situation. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Thus, the Court will deny Respondent's motion to reopen.

[1] Indeed, it is contrary to public policy to allow parties to litigation to change their minds about a settlement once it is finalized. To allow such would be to discourage the government from entering into settlements in the future. Respondent is essentially acting in bad faith.

Accordingly, the following Orders will be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's motion to reopen is **DENIED.**

IT IS FURTHER ORDERED that the Respondent's grant of voluntary departure is **TERMINATED.**

IT IS FINALLY ORDERED that the alternate order of removal to **THAILAND** will take effect immediately.

Date: March 9, 2016
Dallas, Texas

R. Wayne Kimball
United States Immigration Judge