U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: INOUE, KOSEI

A 089-244-823

Date of this notice: 7/9/2013

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

williame
Userteam: Docket

File: A089 244 823 - Honolulu, HI

Date: JUL - 9 2013

In re: KOSEI INOUE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carmen DiAmore-Siah, Esquire

ON BEHALF OF DHS: Chandu Latey
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; voluntary departure

The respondent appeals from the decision of the Immigration Judge dated October 7, 2011, denying the respondent's motion to terminate, finding the respondent removable as charged, and granting the respondent voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The appeal will be dismissed.

We affirm the decision of the Immigration Judge concluding that the respondent is removable under section 237(a)(1)(C)(i) of the Act, 8 U.S.C. § 1227(a)(1)(C)(i) because he violated the conditions of his "E-2" non-immigrant status when his employment was terminated by his petitioning employer (I.J. at 5-6). We do not find clear error in the Immigration Judge's findings of fact related to the respondent's E-2 status or his employment history. The respondent was admitted to the United States on May 30, 2009, based on a nonimmigrant E-2 visa petition that was filed on his behalf by Kaze, Inc. (I.J. at 4). Kaze, Inc. indicated in the visa petition that the respondent would serve as a general manager and would be paid $60,000 per year (I.J. at 4). The respondent was authorized to remain in the United States pursuant to his admission in E-2 status, assuming he complied with all the conditions of such status, until May 29, 2011 (I.J. at 4). Kaze, Inc. terminated the respondent's employment on October 29, 2009 (I.J. at 4). On November 13, 2009, the respondent filed an application to extend or change nonimmigrant status (Form I-539) in which he requested to change his status from E-2 to B-1 (I.J. at 4). This application was denied by the United States Citizenship and Immigration Service (USCIS) on January 4, 2010 (I.J. at 4-5).

We affirm the Immigration Judge's determination that the termination of the respondent's employment with the petitioning treaty investor constitutes a violation of a condition of the respondent's status. The respondent's status in the United States was based solely on his employee relationship with the treaty investor. 8 C.F.R. § 214.2(e)(3). Once this employment relationship was terminated, the respondent violated a condition of his status. *See* 8 C.F.R. § 214.2(e)(8) (discussing the terms and conditions of E treaty status).

In this regard, we find unpersuasive the respondent's argument that the Immigration Judge erred in finding him removable as charged because the I-539 denial notice indicates that the respondent, "may remain in the current nonimmigrant status until the expiration date indicated on the applicant's Arrival and Departure Record (Form I-94)" (I.J. at 4-5; Exh. 3 at 43). The very next sentence in the notice indicates, "[h]owever, should the applicant fail to maintain nonimmigrant status...the applicant must depart the United States" (Exh. 3 at 43). As the respondent did not maintain valid E-2 nonimmigrant status because his employment was terminated, the I-539 denial notice affords him no protection from removal.

Finally, we find no basis to reinstate either a prior E-2 visa, filed by another petitioner and approved on October 2, 2006 or the E-2 visa by which the respondent obtained his most recent admission into the United States (Respondent's Br. at 4-11). We do not find clear error in the Immigration Judge's determination that the respondent did not establish he was the victim of fraud (I.J. at 6). Moreover, even assuming arguendo that the respondent was the victim of fraud with respect to the E-2 petitions, neither the Immigration Judge nor this Board has jurisdiction over such petitions.

In sum, we affirm the Immigration's determination that the respondent violated the conditions of his status when his employment with the treaty investor was terminated. We therefore also affirm the contingent determination that the respondent is removable under section 237(a)(1)(C)(i) of the Act because he violated the conditions of his E-2 status.

The Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of $500 to the Department of Homeland Security within five business days from the date of the order (I.J. at 7). Effective January 20, 2009, pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the required voluntary departure bond was posted with the Department of Homeland Security, and if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order.

The record does not reflect that the respondent submitted timely proof of having paid the voluntary departure bond. The Immigration Judge properly advised the respondent of the need to inform the Board, within 30 days of filing an appeal, that the bond has been paid (I.J. at 7; Notice to Respondents Granted Voluntary Departure). Therefore, the voluntary departure period granted by the Immigration Judge will not be reinstated, and the respondent shall be removed from the United States pursuant to the Immigration Judge's alternate order. *See* 8 C.F.R. § 1240.26(c)(3); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). Accordingly, the following orders will be entered.[1]

[1] We have not considered the evidence the respondent submitted to the Board while his appeal has been pending. The Board is an appellate body whose function is to review, not create, a record. *See Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). To the extent this evidence is new, the respondent has not filed a motion to remand, and we cannot consider new evidence presented for the first time on appeal. 8 C.F.R. § 1003.1(d)(3)(iv). Moreover, the respondent has not shown how this new evidence was not previously available and could not

(Continued . . . .)

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed to Japan pursuant to the Immigration Judge's alternative order of removal.

FOR THE BOARD

have been presented at his hearing before the Immigration Judge. 8 C.F.R. § 1003.2(c); *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). Consequently, we adjudicated the appeal based upon the evidence contained in the record when it was before the Immigration Judge.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Honolulu, Hawaii

File No.: A 089 244 823 October 7, 2011

In the Matter of	)	
	)	
KOSEI INOUE	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(C)(i) of the Immigration and Nationality Act - nonimmigrant failed to maintain or comply with conditions of status.

APPLICATIONS: Termination; voluntary departure.

ON BEHALF OF RESPONDENT:

Carmen DiAmore-Siah, Esquire

ON BEHALF OF DHS:

Chandy
~~Shawn Dawn~~ Latey
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45-year-old married native and citizen of Japan. The Department alleges that he was admitted at Honolulu on May 30, 2009, as a nonimmigrant E-2 with authorization to remain until May 29, 2011. The Department further alleged that the respondent was terminated by the petitioner on October 29, 2009, and that he thereafter remained in the United States without authorization. Proceedings were

commenced with the filing of a Notice to Appear with the Immigration Court at Honolulu, on February 24, 2010. See Exhibit 1.

The respondent, with the assistance of counsel, admitted allegations 1, 2 and 3, denied allegation 4 and contested removability. Respondent designated Japan should that become necessary.

The Individual hearing was conducted on October 7, 2011. Exhibits 1 through, and including, 9 were received. Exhibit 10 was marked for identification only.

At the Individual hearing, respondent argued that the case should be terminated and, in the alternative, that the Immigration Judge should restore respondent to his E-2 status. In the alternative, the respondent requested voluntary departure.

Respondent filed numerous documents related to the business, which the Court has reviewed. These documents appear to reveal the following events.

On or about December 20, 2005, respondent signed a service agreement between Worldwide Pet Services, Inc. ("Worldwide"), a Hawaii corporation, and Baytown, LLC ("Baytown"), a Hawaii limited liability company, See Exhibit 3[1], operate a pet grooming service, See Exhibit 9. Respondent, as president of Worldwide,

[1]Worldwide was incorporated by the respondent apparently to operate a pet grooming service. See Exhibit 9. Respondent's articles of incorporation were filed on December 21, 2005, with the State of Hawaii, Department of Commerce and Consumer Affairs, Business Registration Division.

agreed to manage the pet grooming business owned by Baytown. The service agreement signed on December 20, 2005, was to last five years and ran from March 1, 2006, until February 28, 2011. See Exhibit 9.

On or about May 30, 2006, Baytown, through its counsel, filed an application for Baytown to be qualified as an E-2 company and an application for the respondent to enter under an E-2 visa as manager/executive. See Exhibit 7. On October 2, 2006, the U.S. Department of State issued the E-2 nonimmigrant visa to respondent with an expiration date of September 28, 2011. See Exhibit 2. According to Baytown, respondent was to serve as a manager/executive for Baytown LLC, to be paid an annual salary of $48,000 and to temporarily serve as president for up to three years in the United States. See Exhibit 7.

On or about May 14, 2007, the respondent was admitted to the United States lawfully under the E-2 nonimmigrant visa that was filed on his behalf by Baytown.

On or about August 31, 2008, respondent allegedly breached his service agreement to Baytown by "advertising their business and services under the name Hawaii Pet Academy, a Japanese dog grooming website." See Exhibit 9.

On or about October 16, 2009, Kaze U.S.A, Incorporated ("Kaze, Inc"), entered into an agreement with Worldwide and with Baytown and agreed to buy and take over Worldwide. See Exhibit 7.

On or about October 8, 2008, Kaze, Inc. filed a Form I-129, petition for nonimmigrant worker, on behalf of the respondent. See Exhibit 8. Kaze, Inc. stated on the Form I-129 that respondent is requesting a new E-2 classification because he had a "change of employer." Kaze, Inc. stated that respondent's position at Kaze, Inc. is "general manager" and he would be paid $60,000 per year in wages for a period of two years. See Exhibit 8. Kaze, Inc. also stated on this Form I-129 that respondent's current E-2 was set to expire May 13, 2009.

On October 24, 2008, Kaze, Inc.'s, I-129 petition was granted. See Exhibit 8.

On May 30, 2009, respondent was admitted to the United States under the new E-2 nonimmigrant visa issued to respondent on behalf of Kaze, Inc. and the visa was valid until May 29, 2011. This is consistent with the date alleged in the Notice to Appear.

On October 29, 2009, Kaze, Inc. terminated the respondent from employment. See Exhibit 2, Page 1.

On November 13, 2009, respondent filed a Form I-538, application to extend/change nonimmigrant status, requesting that his status be changed from E-2 to B-1. See Exhibit 3.

On or about January 4, 2010, USCIS denied respondent's application to change status because he did not provide a detailed explanation of why he should be granted an extension of stay, he did not demonstrate an intent to remain temporarily and

he failed to demonstrate that he had the financial resources to invest and not become a public charge. See Exhibit 3, Page 41. USCIS stated that respondent may remain in the United States until the expiration on the I-94.

As stated above, respondent was served with the Notice to Appear on February 22, 2010.

In this case, the Court finds that the Department has established removability on the initial charge by clear and convincing evidence since the respondent was clearly terminated by the petitioning employer. Moreover, although there was no lodged charge, respondent has remained in the United States beyond May 29, 2011, with no status at all, it could be argued.

Respondent, through counsel, did make an oral argument that the Court had authority to reinstate the E-2 investor status. The Court finds that it does not have jurisdiction to do so.

Under Section 237(a)(1)(C)(i) of the Act, any alien who was admitted as a nonimmigrant and who has failed to maintain a nonimmigrant status in which the alien was admitted or to which it was changed under Section 248 or to comply with the conditions of any such status is deportable.

Respondent's failure to maintain or comply with the conditions of the E-2 nonimmigrant status as an employee of Kaze, Inc., is demonstrated by the termination of employment as a manager, proof of which the DHS filed at Exhibit 2. Under 8 C.F.R. Section 214.2(e)(8)(VII), an authorized change of

employment to a new employer, will constitute a failure to maintain status within the meaning of Section 237(a)(1)(C)(i) of the Act. Since the respondent has not received permission from the DHS to change his employer, and he is no longer an employee of the treaty investor company, the Department has established that respondent failed to maintain his status.

Regarding the other argument that respondent is a treaty investor himself, this is not supported by the record. The respondent argues that he is an investor in Baytown with respect to his first E-2 nonimmigrant visa. See Exhibit 9. Even assuming respondent was an investor, he was admitted into the United States successfully as an E-2 nonimmigrant when he worked for Kaze, Inc., and, therefore, his removability can only be evaluated from his successful "change of employer, I-129 petition." As stated above, the petition was denied by USCIS and the Court does not have jurisdiction to reinstate that. Most of respondent's problems appear to be civil matters that need to be litigated in a State Court.

As stated above, even if respondent's argument that he did not lose status when he was terminated by the petitioning employer was correct, as of the date of the Individual hearing, that E-2 visa has expired since it was only valid until May 29, 2011.

The only relief available to the respondent is voluntary departure. The respondent testified that he has a "very tight

financial" situation, but he could borrow money for a bond and a ticket or obtain money from Japan. There are no adverse factors in the case which would prompt the Court to deny voluntary departure.

Accordingly, the following orders shall be entered:

ORDER

IT IS HEREBY ORDERED that the motion for termination of proceedings is denied.

IT IS FURTHER ORDERED that the application for voluntary departure is granted and that the respondent must leave the United States on or before December 6, 2011, and must post a bond in the amount of $500, within five business days, and with an alternate order of removal to Japan.

Dayna Beamer

DAYNA BEAMER
Immigration Judge

*Decision only reviewed for clerical errors only & without benefit of Record of Proceedings on Jan. 3, 2012.

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DAYNA BEAMER, in the matter of:

KOSEI INOUE

A 089 244 823

Honolulu, Hawaii

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.

Cynthia B. Whitlock/TC

Cynthia B. Whitlock, Transcriber
Free State Reporting, Inc.

December 7, 2011
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, and/or CD, 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.