



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals Office of the Clerk

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Name: SEABRA, EDMAR PETIT

A 075-393-099

Date of this notice: 10/21/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donne Carr

Donna Carr Chief Clerk

Enclosure

Panel Members: Malphrus, Garry D. Mann, Ana Mullane, Hugh G.

Userteam: Docket

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U.S. Department of Justice Executive Office for Immigration Review

Falls Church, Virginia 20530

File: A075 393 099 – Miami, FL

Date:

OCT 212015

In re: EDMAR PETIT <u>SEABRA</u>

IN REMOVAL PROCEEDINGS

ON CERTIFICATION AND APPEAL

ON BEHALF OF RESPONDENT: Karla R. Lammers, Esquire

ON BEHALF OF DHS:

Li Lopez

Assistant Chief Counsel

APPLICATION: Adjustment of status; voluntary departure

The respondent, a native and citizen of Brazil, appeals from the Immigration Judge's decision dated August 18, 2010, denying the respondent's application for adjustment of status pursuant to section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), and granting the alternative relief of voluntary departure pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The Department of Homeland Security (DHS) opposes the appeal. 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). Because the respondent filed his adjustment of status application after May 11, 2005, it is governed by the provisions of the REAL ID Act. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006).

The respondent seeks adjustment of status through a third-preference employment-based visa for skilled workers, which states he was hired by a bookstore to coordinate accounts receivable and accounts payable, organize bills, reconcile the store's bank account, be a liaison with the accountant and the store manager, and to keep all records organized in accordance with the accountant's instructions (I.J. at 3; Exh. 7). Based on the testimony and evidence, the Immigration Judge found that the "respondent's sole responsibilities consisted of organizing and selling the Evangelical books sold at the store" (I.J. at 7). The Immigration Judge denied adjustment of status on the grounds that the respondent was ineligible for the visa (I.J. at 7-8). See section 245(i)(2)(A) of the Act.

¹ This case was last before us on May 11, 2010, when we remanded the record to the Immigration Judge for the issuance of a complete decision. The Immigration Judge issued a written decision on August 18, 2010, which he certified to the Board on August 26, 2010. The respondent appeals from that decision.

Neither the Immigration Judge nor this Board has jurisdiction to determine the validity of an approved employment based visa petition or an approved labor certification. See Matter of Aurelio, 19 I&N Dec. 458, 460 (BIA 1987) (explaining that Immigration Judges have no jurisdiction to decide visa petitions, or to revoke a visa petition, because these matters lie solely within the jurisdiction of the Director). If the DHS has doubts about its decision to approve the visa petition filed on the respondent's behalf, it has the option to pursue revocation of that petition. See 8 C.F.R. § 205.

However, while an Immigration Judge does not have jurisdiction to revoke an approved visa petition, he or she is not required to ignore evidence regarding a respondent's actual job responsibilities and whether they match those described in the Application for Alien Labor Certification or the Immigration Petition for Alien Worker (Form I-140) in determining whether the respondent is eligible to adjust status based on a valid visa (I.J. at 7-8). *Cf. Matter of Abdoulin*, 17 I&N Dec. 458 (BIA 1980) (affirming the denial of a visa petition on the grounds that the petitioner did not establish that he is entitled to confer immigration benefits to the beneficiary).

With regard to proceedings before the Immigration Judge, the respondent bears the ultimate burden of establishing that he satisfies all applicable eligibility requirements for adjustment of status and that, considering all relevant factors, he warrants a favorable exercise of discretion. See section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A). Issues regarding whether the respondent is employed in the manner provided for in the visa may be a proper consideration in whether to grant adjustment of status in the exercise of discretion. See generally Matter of Blas, 15 I&N Dec. 626, 629 (BIA 1974).

In light of the foregoing, we will remand the record for the Immigration Judge to further consider whether the respondent has met all of the appropriate statutory requirements for adjustment of status and whether he merits such relief in the exercise of discretion. Accordingly, the following order shall be issued.

ORDER: The record is remanded for further proceedings and the issuance of a new decision.

FOR THE BOARD

UNI LÉD STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT MIAMI, FLORIDA

Files: A 075 - 393 - 099

In the Matter of

Edmar Petit SEABRA

IN REMOVAL PROCEEDINGS

Respondent.

CHARGE:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA")

- present in the United States ("U.S.") without being admitted or paroled.

APPLICATION:

INA § 245(i) – Adjustment of status for certain aliens physically present

in the U.S.

INA § 240B(b) – Voluntary departure at conclusion of proceedings.

ON BEHALF OF RESPONDENT:

Giscard Rojas, Esq.

Law Offices of Kravitz and Guerra, P.A.

800 Brickell Ave., Suite 701

Miami, Florida 33131

ON BEHALF OF THE GOVERNMENT:

Hina Askari, Assistant Chief Counsel

DHS / ICE / Office of the Chief Counsel

333 South Miami Ave., Suite 200

Miami, Florida 33130

DECISION OF THE IMMIGRATION COURT

I. INTRODUCTION

The hearing in this matter was conducted in Miami, Florida, on October 6, 2008. Edmar Petit Seabra ("the Respondent") is a native and citizen of Brazil. See Exh. 1. The Respondent arrived in the U.S. without being admitted or paroled in 1994. Tr. at 36. On April 17, 1997, the former Immigration and Naturalization Service ("INS") approved an Immigrant Petition for Relative (Form I-130) that the Respondent's wife filed on his behalf. See Exh. 2. On April 5, 2007, the U.S. Citizenship and Immigration Services ("USCIS") received the Respondent's Immigrant Petition for Alien Worker (Form I-140). See Exh. 5. On July 29, 2007, the Respondent submitted his Application to Register Permanent Residence or Adjust Status (Forms I-485; I-485A; G-325A). See Exh. 6. On August 14, 2007, the USCIS approved the Respondent's Immigrant Petition for Alien Worker. See Exh. 7.

The Respondent, through counsel, admitted the allegations in the Notice to Appear ("NTA") and concedes removability as charged. The Respondent seeks adjustment of status under INA § 245(i), and in the alternative, voluntary departure, under INA § 240B(b).

On October 6, 2008, in an oral decision, the Immigration Court found the Respondent removable as charged and ineligible for adjustment of status under INA § 245(i), but granted his application for voluntary departure under INA § 240B(b). Tr. at 66-68. The Respondent appealed the decision. In the Respondent's appellate brief he argued that the Immigration Judge erred: (1) when he determined that the Respondent was clearly not a bookkeeper, (2) in finding that the Respondent's wife had an ownership interest in the petitioning employer that made him ineligible for relief, and (3) when he denied the Respondent's application for adjustment of status.

The Board remanded the decision to the Immigration Court because it found that the oral decision was "not identified or separated form the transcript." BIA remand; see 8 C.F.R.

§ 1240.12(a); *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). Without discussing the merits of the appeal, the BIA remanded the proceedings with instructions for the Immigration Court to prepare a decision that includes findings as to removability, reasons for granting or denying the requested relief, and an order pursuant to the findings.

II. CORE ISSUES

The Respondent argues that he is eligible to receive an immigrant visa and that one is immediately available to him. He asserts that he has been employed as a bookkeeper at El Shaddai Gospel Store pursuant to the terms of the immigrant petition for alien worker (Form I-140) filed and approved on his behalf, and that therefore he is eligible to adjust status.

III. BRIEF STATEMENT OF LEGAL STANDARDS

Adjustment of Status of Certain Aliens Physically Present in the U.S. An alien physically present in the U.S. who entered without inspection, who is the beneficiary of an application for a labor certification filed on or before April 30, 2001, and who was physically present in the United States on December 21, 2000, is eligible to apply for adjustment of status to that of a lawful permanent resident. INA § 245(i)(1). The alien's status may be adjusted if the alien is eligible to receive an immigrant visa, is admissible to the U.S. for permanent residence, and an immigrant visa is immediately available to him. INA § 245(i)(2). Immigration judges may hear adjustment applications under INA § 245(i). Matter of Grinberg, 20 I&N Dec. 911 (BIA 1994). A petition for alien worker (Form I-140) that has been filed and remains unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed. See INA § 204(j).

Voluntary Departure. Under INA § 240(B)(b)(1) and 8 C.F.R. § 1240.26(c), an Immigration Judge may permit an alien voluntarily to depart the U.S. at the alien's own expense

if, at the conclusion of a proceeding under INA § 240, the Immigration Judge enters an order granting voluntary departure in lieu of removal and finds that the alien has been physically present in the U.S. for a period of at least one year immediately preceding the date the notice to appear was served under INA § 239(a), the alien is, and has been, a person of good moral character for at least five years immediately preceding the alien's application for voluntary departure, the alien is not removable under INA § 237(a)(2)(A)(iii) or INA § 237(a)(4), and the alien has established by clear and convincing evidence that the alien has the means to depart the U.S. and intends to do so.

IV. SUMMARY OF FACTS

The Respondent arrived in the U.S. in 1994 without inspection and has not left the country since that date. Tr. at 36. He testified that he married Angeldina Guillen in 1997 for love and affection and not for immigration benefits. Tr. at 36. The Respondent's marriage lasted approximately two years before he and his wife started having problems, and they got divorced in 2000 or 2001. Tr. at 37. The Respondent met his current wife, Marcia de Alameda, at church, and married her several months after he divorced his first wife. Tr. at 38, 49. The Respondent's current wife does not have legal status in the U.S. Tr. at 38.

The Respondent testified that he currently works full-time for El Shaddai Gospel Store, Inc. ("El Shaddai"). Tr. at 38-39. He has worked there since 2001 and makes between \$450 and \$500 per week. Tr. at 38-39.

The Immigrant Petition for Alien Worker filed by El Shaddai states the Respondent's job description as follows: "To coordinate accounts payable, accounts receivable, organize bills, reconcile bank account, liaison with accountant and with store manager, keep all records organized according to the accountant's instructions." See Exh. 7. The Respondent claimed that his current job position is "maintaining the books and selling." Tr. at 38. Upon further questioning, he stated that "I read and know the books, and I sell the books to people as somebody who's an Evangelical Christian. I explain these books to pastors that come in and ask about them." Tr. at 39-40.

Upon questioning by the government, the following dialogue took place:

DHS: And what were you, what were you hired to do there when you first

started working there?

Respondent: Maintain books. Because I knew where the bookstores, the Evangelical

bookstores were.

DHS: Okay. When you say maintain books, what do you mean?

Respondent: That means take care of the bookstore and to know which are the best

Evangelical books that I could pass on to the Evangelical churches.

Tr. at 53.

When the government asked if the Respondent ever worked in accounting for El Shaddai, he stated, "Yes, I also work with money because you have to help out." Tr. at 54. When the

government clarified that it meant accounting in terms of accounts payable and accounts receivable, the Respondent answered, "Yes, all that...we also worked with inter-transfer that sends money to South America." Tr. at 54.

When asked what kind of education he had received to be a bookkeeper in the accounting sense, the Respondent asserted, "I didn't do accounting, any of the accounting books. I just paid for the books that came in, the Bibles and so forth. There wasn't any book accounting." Tr. at 54. He said that the accountant is responsible for the store's accounting. Tr. at 54. When questioned if he did any other kind of work at El Shaddai besides selling book to customers, he responded, "No, there is no way." Tr. at 59.

The Respondent was questioned about whether his current wife ever worked at El Shaddai. The following dialogue took place:

DHS: Now does your wife, Marcia de Alameda, work at El Shaddai?

Respondent: No, she never worked there. She helped me out sometimes when I wasn't

working, she was sometimes go there. But she wasn't working there.

DHS: Has she ever been associated with running that business?

Respondent: I'm not sure, because at the time I was working there whether she was

called up because she was somebody who was in confidence and did

something there or not, I'm not really sure.

Tr. at 45-46.

The government then stated that it had a Certificate of Registration for El Shaddai Gospel Store, addressed to Marcia de Alameda. Tr. at 46. After copies of the document were made for the Immigration Court, it was shown to the Respondent. Tr. at 48-49. When the government asked if the Respondent knew why this document would be addressed to his wife, he responded, "I personally think this business was sold to Mrs. St. Clair Fritz (phonetic sp.), the owner... My wife sold it to Senora St. Clair Fritz, who is the owner." Tr. at 49. When asked why he had not mentioned that she had been a previous owner, he stated, "Because in reality she's not the owner. I was just chosen to work there because I'm Evangelical." Tr. at 49. The Respondent stated that his wife cleans homes and has never worked anywhere else. Tr. at 61. When asked about his wife's relationship to El Shaddai, he then stated that "she passed the store onto Senora Fritaz...Either she was the owner or had some sort of partnership with that woman, I'm not sure." Tr. at 61. The Respondent did not know when this transaction took place. Tr. at 61-62. He stated that currently his wife held no interest in El Shaddai. Tr. at 62.

Before El Shaddai Gospel Store, Inc. filed the immigrant petition for alien worker for the Respondent, the First Brazilian Baptist Church of Greater Miami filed a previous petition for the Respondent as a religious worker (form I-360). Tr. at 49-50. The Respondent testified that El Shaddai and the First Brazilian Baptist Church were not related. Tr. at 50. He asserted that the religious worker petition was eventually withdrawn. Tr. at 50. He testified that his petition was withdrawn because there had been a problem with Javier Lopez, the preparer. Tr. at 51. When questioned as to why the church did not file a second religious worker petition he stated that it was because it had a fear of doing something wrong. Tr. at 52.

The Respondent testified that he cleans supermarkets at night after working at El Shaddai. Tr. at 40.

V. EVIDENCE

Testimony. Among other things, the Respondent testified about his work at El Shaddai Gospel Store, Inc. He indicated that his wife previously had taken part in a business transaction concerning El Shaddai.

Documentary Evidence. The following evidence was considered by the Immigration Court:

- Exhibit 1: Notice to Appear, dated June 21, 2004.
- Exhibit 2: Respondent's exhibits:
 - Immigrant Petition for Relative, Fiancé, or Orphan (Form I-130) filed by the Respondent's first wife, with receipt date of April 17, 1997;
 - 2. Online status check confirming approval of I-130;
 - Letter from Alien Labor Certification Unit, dated April 23, 2004;
 and
 - 4. Department of State Visa Bulletin for January 2005, showing employment-based preference category 3 was current in 2005 for the Respondent.
- Exhibit 3: El Shaddai Gospel Store, Inc. Audit Notice, dated November 25, 2005, for Application for Permanent Employment Certification (Employment and Training Administration ("ETA") Form 9089).
- Exhibit 4: Selection of Continuation Option Letter from El Shaddai Gospel Store, Inc.
- Exhibit 5: Receipt Notice for Immigrant Petition for Alien Worker (Form I-140), dated April 10, 2007.
- Exhibit 6: Respondent's exhibits, filed August 16, 2007:
 - 1. USCIS update on July 17, 2007, creating window of opportunity for filing of employment-based adjustment applications under Visa Bulletin Number 107;
 - 2. Visa Bulletin Number 107 of July 17, 2007, indicating that employment-based preference category 3rd is current;
 - 3. Application to Register Permanent Residence or Adjust Status (Form I-485), filed with the Court on August 16, 2007; and

- 4. Receipt Notice for Application to Adjust to Permanent Resident Status, with notice date of August 8, 2007.
- Exhibit 7: Immigrant Petition for Alien Worker (Form I-140) approval, approved August 14, 2007, filed with the Court December 11, 2007.
- Exhibit 8: Respondent's exhibits, filed January 2, 2008:
 - 1. Confirmation of permanent employment offer from El Shaddai Gospel Store, Inc., dated December 14, 2007;
 - 2. Articles of Incorporation for El Shaddai Gospel Store, Inc.;
 - 3. Corporate tax returns for 2004 and 2005;
 - 4. ETA Application for Alien Employment Certification (Form 750A and 750 B), certified February 23, 2007;
 - 5. Original Immigrant Petition for Alien Worker (Form I-140) approval notice, dated August 15, 2007;
 - 6. Copy of Immigrant Petition for Relative, Fiancé, or Orphan (Form I-130) as grandfathering proof, dated September 25, 1997;
 - 7. Final dissolution of previous marriage to Angeldina Guillen, dated August 21, 2000;
 - 8. Marriage certificate for marriage to Marcia Vieira de Almeida, dated January 25, 2001;
 - 9. Copy of Respondent's passport;
 - 10. Respondent's birth certificate and translation;
 - 11. Updated police report letter, printed December 13, 2007;
 - 12. Original final disposition "nolle pros" and original police report dated March 11, 2005; and
 - 13. Medical examination/pictures.
- Exhibit 9: Respondent's exhibits, filed January 17, 2008:
 - 1. 2006 corporate income tax return for El Shaddai Gospel Store, Inc.;
 - 2. Employer's Quarterly Federal Tax Return (Form 941) for last quarter of 2007; and
 - 3. Employer's Quarterly Report (Form FL UCT-6), showing employer's unemployment return for last quarter of 2007.
- Exhibit 10: Petition for Amerasian, Widower, or Special Immigrant (Form I-360), dated June 6, 2001; and Acknowledgement of Withdrawal Request from the DHS, considering the I-360 petition to be withdrawn.
- Exhibit 11: El Shaddai Gospel Store's tax returns, filed May 27, 2008, for the following years:
 - 1. 2004;

- 2. 2005; and
- 3. 2006.

Exhibit 12: Respondent's affidavit filed August 15, 2008, stating that his marriage to Angeldina Guillen was entered into out of love and affection, and that the I-130 petition filed by Ms. Guillen was approved by the legacy Immigration and Naturalization Services ("INS").

Exhibit 13: Certificate of Registration for El Shaddai Gospel Store, effective June 17,1998.

VI. FINDINGS AND ANALYSIS

Eligibility for Adjustment of Status Under INA § 245(i). Because the respondent was present in the U.S. on December 21, 2000, and is the beneficiary of an approved petition for relative, fiancé, or orphan (form I-130) that was filed before the statutory cut-off date of April 30, 2001, he is eligible to apply for adjustment of status under INA § 245(i). See Exh. 2, Tab 1. Because he is grandfathered-in for 245(i) relief, he may apply for adjustment of status based on an immigrant petition for alien worker. See 8 C.F.R. § 1245.10.

Eligibility for and Availability of an Immigrant Visa. In order to prevail on his adjustment application, the Respondent must demonstrate that he is admissible to the U.S., that he is eligible to receive an immigrant visa, and that an immigrant visa is immediately available to him. INA § 245(i)(2).

The Immigration Court finds the Respondent admissible to the U.S. See Tr. at 40-41, Legal Opinion, Martin, General Counsel, INS, CO 245(i), CO 212(a)(6)(A) (Feb. 19, 1997), reprinted in 74 No. 11 Interpreter Releases 499, 516-22 (Mar. 24, 1997) (determining that because section 245(i) was applicable to those who entered without inspection, they were therefore able to adjust their status, notwithstanding a charge under INA § 212(a)(6)(A)(i)). It is undisputed that an employment-based visa in category three was available to the Respondent at the time he filed his adjustment of status application. See Exh. 5; Exh. 6, Tab 2 (visa bulletin).

The Respondent is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) as of August 14, 2007. Exh. 7. However, the Immigration Court still must determine whether the alien is eligible to receive an immigrant visa. INA § 245(i)(2)(A). The Respondent's approved Immigrant Petition states that his job description should consist of coordinating accounts receivable and accounts payable, along with organizing bills and records and reconciling the store's bank account. See Exh. 7. From the Respondent's testimony, it is clear to the Immigration Court that the Respondent's sole responsibilities consisted of organizing and selling the Evangelical books sold at the store. The Respondent repeatedly stated that the only form of "bookkeeping" he participated in was buying and selling books at the store. When questioned as to whether he participated in any accounting aspects at the store, he specifically stated that the store's accountant handled those types of situations. The Immigration Court finds

the Respondent ineligible for an immigrant visa and thus unable to adjust his status under INA § 245(i).

The Immigration Court is concerned that the Respondent's wife may have been a business owner of El Shaddai Gospel Store, Inc. However, because the Respondent is not eligible to adjust status under section 245(i) for the reasons stated above, the Immigration Court makes no findings regarding whether the wife's involvement would preclude the Respondent from being able to pursue relief.

Because the Immigration Court finds that the Respondent is ineligible to receive an immigrant visa, his application for adjustment of status will therefore be denied. See INA § 245(i)(2)(A).

VII. VOLUNTARY DEPARTURE

The Immigration Court finds that the Respondent has met all the criteria for voluntary departure, and thus this form of relief will be granted. See Tr. at 69-70.

VIII. CONCLUSION

The Immigration Court finds the Respondent removable as charged. Because the Respondent has not been working for El Shaddai Gospel, Inc. in the capacity that was described on his approved I-140 form, he is not eligible to receive an immigrant visa at this time. The following orders are therefore entered:

ORDER: The Respondent's application for adjustment of status under INA § 245(i) is DENIED.

FURTHER ORDER: The Respondent's request for voluntary departure under section 240B(b) of the Act is GRANTED. The Respondent is permitted voluntarily to depart the United States in lieu of removal, without expense to the government, on or before October 18, 2010, or any extension thereof as may be granted by the Department of Homeland Security and under whatever conditions the Department may direct as part of such an extension.

FURTHER ORDER: The Respondent shall post a voluntary departure bond with the DHS in the amount of \$500 within 5 business days.

FURTHER ORDER: If any of the conditions set by the Court or the DHS are not met, the above order granting voluntary departure shall be withdrawn without further notice or proceedings, and the following order shall become immediately effective: The Respondent shall be removed to Brazil on the charge specified in his Notices to Appear.

WARNING TO THE RESPONDENT: If the Respondent fails to voluntarily depart the U.S. within the time period specified, or any extensions granted by the DHS, the Respondent shall be subject to a civil penalty of \$3,000.00, as provided by the regulations and the statute, and he

shall be ineligible for a period of 10 years for any further relief under INA §§ 240B, 240A, 245, 248, and 249. See INA § 240B(d).

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any notice of appeal must be received at the Board of Immigration Appeals within 30 calendar days after the date of service of this decision.

> Honorable Rodger C. Harris U.S. Immigration Judge

cc: Respondent / Counsel for Respondent Counsel for Government 8/24/2010 By: 1.7. Mailed: