U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SMITH JODA, FATIMO EYITAYO ... **A 079-134-441**

Date of this notice: 8/11/2020

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:
Mann, Ana
Grant, Edward R.
Mullane, Hugh G.

Userteam: Docket

File: A079-134-441 – Atlanta, GA

Date: AUG 11 2020

In re: Fatimo Eyitayo Renke SMITH JODA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Uzo A. Akpele, Esquire

APPLICATION: Adjustment of status

This matter was last before the Board on June 15, 2016, when we remanded the record to the Immigration Judge for further proceedings. On April 5, 2018, the Immigration Judge issued a written decision, denying the respondent's application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i).[1] The respondent appeals from that decision. The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be sustained, and the record will again be remanded for further proceedings consistent with this opinion.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The following facts are not in dispute.[2] The respondent, a native and citizen of Nigeria, entered the United States without inspection and married a United States citizen who filed a Petition for Alien Relative, Form I-130 (visa petition), on the respondent's behalf on April 30, 2001 (IJ at 1; Tr. at 12-13; Exhs. 1, 2, 2B, 6).[3] The visa petition was approved on May 15, 2005, but was subsequently withdrawn by the petitioner on October 3, 2007 (IJ at 2; Exhs. 3, 6, 6B). The couple divorced on October 23, 2008, and the respondent married her current husband, also a

[1] The Immigration Judge has entered four decisions on this case – on April 21, 2009; July 9, 2012; September 24, 2014; and April 5, 2018. Unless otherwise specified, references to "IJ" are to the most recent decision.

[2] Some of the facts recited in this order were not formally found by the Immigration Judge but may be determined based on the submission of records from U.S. Citizenship and Immigration Services (USCIS) and the Georgia State Office of Vital Records. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting our appellate fact-finding authority to "taking administrative notice of commonly known facts such as . . . the contents of official documents"); *Matter of S-H-*, 23 I&N Dec. 462, 465-66 (BIA 2002).

[3] All references to "Tr." in this order are to the proceedings completed on July 9, 2012, unless otherwise specified.

United States citizen, on November 12, 2008 (IJ at 2; Exh. 4). The respondent's current husband then filed a visa petition on her behalf, and that petition was approved on October 19, 2009 (IJ at 2; Exhs. 4, 5C).

Before the Immigration Judge, the respondent sought adjustment of status under section 245(i) of the Act, based on (1) visa availability through the approved petition filed by her current husband and (2) her status as a grandfathered alien based on the visa petition withdrawn by her former spouse (IJ at 1-2). However, the Immigration Judge concluded that the respondent did not carry her burden of proof in establishing that her first marriage was bona fide at its inception, and thus, that the first visa petition filed on her behalf was approvable when filed (IJ at 2). *See* 8 C.F.R. § 1245.10(a)(3). The Immigration Judge also determined that the respondent did not establish she was physically present in the United States on December 21, 2000, as required by section 245(i)(1)(C) of the Act (IJ at 7).

On appeal, the respondent argues that she carried her burden to establish her first marriage was bona fide at inception, and accordingly, the visa petition filed on her behalf was approvable when filed (Respondent's Br. at 9-22). Specifically, she asserts that USCIS in fact approved the first visa petition, thereby demonstrating the respondent had satisfied all the evidentiary requirements (Respondent's Br. at 13-15). She further maintains that if there had been actual problems with the bona fides of her first marriage, these problems could have adversely impacted the adjudication of the second visa petition filed on her behalf, which USCIS subsequently approved (Respondent's Br. at 15-17). *See, e.g.*, section 204(c) of the Act, 8 U.S.C. § 1154(c) (explaining that no immediate relative or preference-based visa petition may be approved on behalf of a beneficiary who was determined to have previously entered into a marriage for the purposes of evading the immigration laws).

Upon review, the respondent has established the first visa petition was approvable when filed. Although the respondent bears the burden of proving the marriage was bona fide at inception, the record as a whole shows the respondent has successfully met her burden. *See* 8 C.F.R. § 1240.8(d); *Matter of Jara Riero & Jara Espinal*, 24 I&N Dec. 267, 269 (BIA 2007). The USCIS affirmatively approved the petition on May 15, 2005, indicating that the respondent had established a bona fide marriage to her former husband (Exhs. 3, 6). The evidence in this removal proceeding submitted by DHS is incomplete in that it lacks any documents from the visa petition proceeding that are favorable to support the visa petition's approval. Thus, the evidence that was submitted does not establish that the petition was improperly favorably adjudicated in the first instance, and thus, was not approvable when filed.

The applicable regulations specifically take into account the fact that a relationship may deteriorate between the time a visa petition is filed and the moment it is adjudicated. Therefore, a visa petition that "was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status . . . ." 8 C.F.R. § 1245.10(a)(3). The determinative issue is whether "the visa petition would have been approved had it been adjudicated on the date it was filed . . . ." *Matter of Butt*, 26 I&N Dec. 108, 115 (BIA 2013). Here, the visa petition was actually approved, and we generally are precluded from looking behind USCIS's decision approving that petition (Exhs. 3, 6). *See Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (explaining that

Immigration Judges have no authority to adjudicate visa petitions or to review visa petition adjudications outside of the context of visa petition proceedings).

In addition, record evidence indicates that USCIS approved the visa petition the respondent's former husband had filed on behalf of the respondent's daughter, and the agency later granted the daughter's application for adjustment of status (Exh. 3). The approval of such a stepchild petition is only possible where the petitioner has established the existence of a bona fide marriage between the petitioner and the non-citizen parent. *See Matter of Awwal*, 19 I&N Dec. 617 (BIA 1988) (holding that a step-relationship under section 101(b)(1)(B) of the Act, 8 U.S.C. § 1101(b)(1)(B), must be based on a marriage that is valid for immigration purposes). The record does not contain evidence that USCIS ever revoked the daughter's visa petition based on the respondent's lack of a bona fide marital relationship to her former husband.

Moreover, where, as here, events arose subsequent to the approval of the petition resulting in its withdrawal, we conclude that there is insufficient evidence in the record to establish that the marriage was not bona fide at inception given the fact of the withdrawal alone (IJ at 4-6; Exh. 6). In this regard, we previously concluded that the letter withdrawing the visa petition filed by the respondent's former spouse does not show that the visa petition was based on a marriage that was not bona fide at its inception (Exh. 6). *See* 8 C.F.R. § 1245.10(a)(3); *Matter of Jara Riero & Jara Espinal*, 24 I&N Dec. at 268-69; *see also Tomay-Hart v. U.S. Att'y Gen.*, 791 F. App'x 857, 861 (11th Cir. 2019). In the course of remanded proceedings, no additional evidence was presented to show that the visa petition in question was improperly adjudicated by USCIS. Without further evidence that the visa petition was not approvable when filed, we determine that the respondent has satisfied her burden to show she met the requirements of a grandfathered alien as the beneficiary of a visa petition filed before April 30, 2001, that was approvable when filed. 8 C.F.R. § 1245.10(a)(1)(i).

To be eligible for adjustment of status under section 245(i) of the Act, a grandfathered alien must also establish that he or she was physically present in the United States on December 21, 2000, for any visa petition filed on or after January 14, 1998. Section 245(i)(1)(C) of the Act; 8 C.F.R. § 1245.10(a)(1)(ii). Although the Immigration Judge found no evidence in the record regarding the respondent's physical presence on the designated date, the Immigration Judge did not identify physical presence as a potential eligibility issue during the pendency of this matter before the Immigration Court, prior to his April 5, 2018, decision.[4] Thus, we conclude that remand of the record is again warranted, and upon remand, the respondent should be given the opportunity

[4] We are not convinced by the respondent's argument that she need not produce more evidence regarding physical presence due to the approval of the first visa petition or her daughter's adjustment of status application (Respondent's Br. at 22-24). Approval of the visa petition did not require evidence of the respondent's physical presence on the date in question. Moreover, although approval of her daughter's application for adjustment of status under similar circumstances may provide some circumstantial evidence of the respondent's physical presence, this evidence would require further fact-finding and evaluation in determining what, if any, weight should be afforded to that consideration.

to provide evidence, such as credible testimony or documents, to satisfy her burden of proof in showing she was physically present in the United States on December 21, 2000.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

Appellate Immigration Judge Hugh G. Mullane dissents without opinion.