



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: KAGAU, PATRICK JONAH

A099-258-131

Date of this notice: 4/26/2012

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:

Adkins-Blanch, Charles K.
Hoffman, Sharon
Manuel, Elise L.

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NY

Falls Church, Virginia 22041

File: A099 258 131 - Dallas, TX

Date:

APR 26 2012

In re: PATRICK JONAH KAGAU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nicolas Chavez, Esquire

ON BEHALF OF DHS: Roslyn Gonzalez
Assistant Chief Counsel

APPLICATION: Continuance

The respondent, a native and citizen of Kenya, has appealed from the Immigration Judge's decision dated June 9, 2010. The appeal will be sustained and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent sought a further continuance to pursue adjustment of status. He had previously sought adjustment through a prior spouse, and the visa petition filed by that spouse was denied. The Immigration Judge denied the continuance for lack of good cause, finding that the respondent could not demonstrate prima facie eligibility for the relief sought. *See generally Matter of Hashmi*, 24 I&N Dec. 785-789 (BIA 2009) (citing apparent statutory eligibility for adjustment as one of the factors to weigh in determining whether good cause exists for granting a continuance); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) (the decision to grant or deny a continuance for good cause is within the sound discretion of the Immigration Judge and will not be overturned on appeal unless it is shown that the respondent was denied a full and fair hearing); 8 C.F.R. §§ 1003.29 and 1240.6. The Immigration Judge made the good cause determination, and also denied the motion in the exercise of discretion, based upon a finding that the previous visa petition was denied for marriage fraud.

While the Notice Of Intent to Deny ("NOID") the previous visa petition questioned the validity of the underlying marriage and referenced the fraud provision under section 204(c) of the

Immigration and Nationality Act, 8 U.S.C. § 1154(c), neither the NOID nor the subsequent Field Office Director's decision denying the visa actually include a determination that the respondent and his previous wife entered into their marriage for the purpose of evading the immigration laws. Rather, the petition was denied based on the parties' failure to submit sufficient evidence to establish a bona fide marriage. Therefore, the Immigration Judge's finding that there was a previous marriage fraud determination was clearly erroneous.

Because the Immigration Judge's denial of the respondent's motion for a continuance rests upon a clearly erroneous factual finding, we find that his decision to deny the continuance was an abuse of discretion. Given the circumstances presented here, we find that a remand is warranted for further proceedings to allow the Immigration Judge to reconsider the respondent's motion for a continuance pending adjudication of the most recent visa petition filed on his behalf, and to also consider any other relief for which the respondent can demonstrate eligibility. *See* 8 C.F.R. § 1240.8(d).

Accordingly, the appeal will be sustained and the record will be returned to the Immigration Court for further proceedings.

ORDER: The appeal is sustained.

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



FOR THE BOARD

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

IN THE REMOVAL CASE OF
KAGAU, PATRICK JONAH
RESPONDENT

CASE NO.: A099-258-131

ORDERS

- [X] This is a memorandum of the Court's Decision and Orders entered on JUNE 9, 2010. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. () Both parties waived issuance of a formal oral decision in the case.
- [X] The respondent was ordered REMOVED from the United States to MEXICO () in absentia.
- [] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.
- [] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of \$ _____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within () thirty days () sixty days from the date of this Order, all necessary travel documents for voluntary departure.
- [] Respondent's application for ASYLUM was () granted () denied () withdrawn with prejudice.
() subject to the ANNUAL CAP under the INA section 207(a)(5).
() Respondent knowingly filed a FRIVOLOUS asylum application.
- [] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for WITHHOLDING of removal under the Torture Convention was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for DEFERRAL of removal under the Torture Convention was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for CANCELLATION of removal under section () 203(b) of NACARA, () 240A(a) () 240A(b)(1) () 240A(b)(2) of the INA, was () granted () denied () withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent () is () is not subject to the ANNUAL CAP under INA section 240A(e).
- [] Respondent's application for a WAIVER under the INA section _____ was () granted () denied () withdrawn or () other _____. () The conditions imposed by INA section 216 on the respondent's permanent resident status were removed.
- [] Respondent's application for ADJUSTMENT of status under section _____ of the () INA () NACARA () _____ was () granted () denied () withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

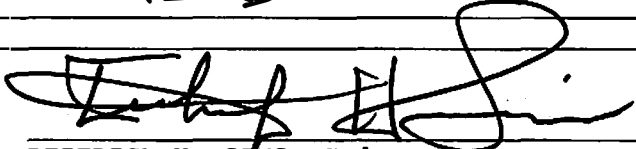
CASE NUMBER: 099-258-131

RESPONDENT: KAGAU, PATRICK JONAH

- [] Respondent's status was RESCINDED pursuant to the INA section 246.
- [] Respondent's motion to WITHDRAW his application for admission was () granted () denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to _____.
- [] Respondent was ADMITTED as a _____ until _____ . As a condition of admission, the respondent was ordered to post a \$ _____ bond.
- [] Case was () TERMINATED () with () without prejudice () ADMINISTRATIVELY CLOSED.
- [] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
- [] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least \$1,000, but not more than \$5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
- [] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to \$500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).

[X] Other: RESPONDENT'S REQUESTS FOR CONTINUANCE WAS DENIED

Date: Jun 9, 2010


DEITRICH H. SIMS, Judge

APPEAL: () waived (X) reserved by (X) Respondent () DHS () Both

DUE BY: July 9, 2010
DHS WAIVED APPEAL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: [] MAIL [X] PERSONAL SERVICE
TO: [X] DHS [X] ALIEN [X] Alien's ATT/REP [] ALIEN c/o Custodial Officer
DATE: 6/9/10 BY: [] COURT STAFF [X] JUDGE DHS

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Dallas, Texas

File No.: A 099 258 131

June 9, 2010

In the Matter of)
PATRICK JONAH KAGAU) IN REMOVAL PROCEEDINGS
Respondent)

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

APPLICATION: Request for a continuance pending the adjudication of a second I-130 petition by a second spouse.

ON BEHALF OF RESPONDENT:

Gary Frost, Esquire
10830 N. Central Expressway
Suite 400
Dallas, TX 75231

ON BEHALF OF DHS:

Rosalind Gonzalez, Esquire
Assistant Chief Counsel
Dallas, TX

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Kenya. He was admitted to the United States at or near Houston, Texas on or about June 18, 2001 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed December 17, 2001. He remained in the United States beyond December 17, 2001 without authorization from Immigration and Naturalization Service or its successor, the Department of Homeland Security. Consequently, the Department of Homeland

Security (hereto referred to as the Government) charged respondent with removal pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as nonimmigrant under Section 101(a)(15) of the Act, you remained in the United States for a longer time than permitted in violation of this Act or any other law of the United States. See Exhibit No. 1.

On November 9, 2009, respondent acknowledge receipt of the Notice to Appear and it was placed in his record as Exhibit No. 1.

On February 22, 2010, the respondent, via counsel, admitted to the factual allegations contained in the Notice to Appear and conceded to the charge of removal. Therefore, removal was established by clear and convincing evidence. See Section 240(c)(3)(A) of the Act. See also 8 C.F.R. Section 1240.8a. In case removal became necessary, respondent designated Kenya.

On February 22, 2010, respondent requested this case be continued for attorney preparation. The Court was informed that an I-130 petition had been filed on his behalf and that he was married to a United States citizen and that marriage took place on January 8, 2010. The respondent's case was continued for attorney preparation until March 29, 2010.

On March 29, 2010, respondent was present with counsel. Respondent indicated that he was married, again, to a United States citizen and that the I-130 petition that was filed on his

behalf was filed on February 21, 2010. The respondent requested his case be continued. The Court continued the case until April 26, 2010.

On April 26, 2010, the respondent was present. He asked that his case be continued in order for him to seek counsel. The Court granted the respondent's request and informed him that his case would be continued but there would be no further continuances in this matter, that the Court would proceed with or without counsel.

The matter was continued from April 26, 2010, until June 7, 2010.

The Court would note that the respondent had previously been represented by a number of attorneys. One of the attorneys was Michael Igwe, and he was the attorney that was present on February 22, 2010, when respondent pled to the factual allegations and to the charge. There is also an E-28 from a Solomon Musyimi that was filed with the Court on March 29, 2010, and apparently those attorneys withdrew from the case or did not appear, and Mr. Frost subsequently entered his appearance on June 7, 2010 for the first time.

On June 7, 2010, the respondent requested his case be continued in order for an I-130 petition to be adjudicated.

In support of his request for a continuance, the respondent had previously submitted on March 29, 2010, the Form I-797C, which indicates that an I-130 petition had been filed by a

petitioner by the name of Ophelia Kagau and the respondent was the beneficiary of this petition. This petition indicates that it was received on February 21, 2010, and the notice date was March 1, 2010. See Exhibit No. 2.

Also, on March 29, 2010, the respondent submitted additional evidence to support his request for a continuance. That evidence consists of the I-130 petition, the G-325, evidence of the petitioner's United States citizenship, a copy of the marriage license between the petitioner and the respondent, and a copy of a divorce decree, and evidence where the respondent purports to establish the bona fides of the marriage, which includes photographs between the petitioner and the beneficiary.

The Government opposes the respondent's requests for a continuance primarily because an I-130 petition had been filed on the respondent at a prior time prior to the I-130 petition being filed by the petitioner Ophelia Kagau. Specifically, the Government informed the Court, through the submission of a decision dated June 10, 2009, of the following. An I-130 petition was filed by a petitioner by the name of Swykia Kagau on about or about February 24, 2005. The Government, on or about January 28, 2005, issued a notice of intent to deny the visa petition. In general, that notice of intent to deny the visa petition, informs the petitioner that the Government has serious concerns about the validity of the marriage, in other words, whether or not the marriage was entered into for Immigration

purposes. Based on that notice of intent to deny a visa petition filed by the petitioner Swykia Kagau, the Government on June 10, 2009, issued a decision denying the visa petition and, in denying the visa petition, finding that the petitioner failed to respond to the notice of intent to deny the visa petition within the time frame. The Government also concluded that the marriage that was entered into between the respondent and the petitioner, Swykia, was entered into for purposes of obtaining an Immigration benefit. In other words, the Government made a 204(c) finding.

In deciding whether or not a continuance should be granted in this matter, the Court looked at the Matter of Hussain Hashmi, 24 I&N Dec. 785, which states that the factors that the Court should consider are the Department of Homeland Security's response to the motion for a continuance, whether the underlying visa petition is prima facie approvable, the respondent's statutory eligibility for adjustment of status, whether respondent's application for adjustment of status merits a favorable exercise of discretion, and the reasons for the continuance and any other relevant procedural factors. See Matter of Hashmi.

The Court concludes that respondent has failed to establish good cause for a further continuance. As a matter of law, the Court notes that the second I-130 petition filed upon respondent's behalf by his present wife, which is a different petitioner than the first petitioner, cannot be approved as a

matter of law. Section 204(c) states in part notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence by reason of a marriage determined by the Attorney General to have been entered into for the purposes of evading the Immigration laws; or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the Immigration laws. See Section 204(c) of the Act.

Based on the evidence in this record and the Government's opposition based on a 204(c) finding, the Court finds that any subsequent petition filed on behalf of respondent by a different spouse than his original spouse of Swykia Kagau cannot be approved as a matter of law. The Court would also note that petitioner Swykia is the appropriate party to appeal the denial of an I-130 petition filed by her on behalf of respondent on or about February 2005 and that, apparently, was not done. Nor was there any response to the notice of intent to deny the I-130 filed by the petitioner Swykia in a timely manner. Therefore, the Court finds that the decision of the Government dated June 10, 2009, based on the notice of intent to deny the visa petition is final and, therefore, there would be no merit or reason to continue this case to allow adjudication of a second I-130

petition filed by the respondent's present wife Ophelia because it cannot be approved as a matter of law and, therefore, there would be no purpose in continuing this case. In addition, the Court finds that the visa petition, that is the second I-130 petition, is not prima facie approvable when filed based on the prior 204(c) finding. In addition, the Court finds the respondent is not eligible for adjustment of status based on the 204(c) finding.

Additionally, the Court finds that the respondent would not merit his application being granted as a matter of discretion for the following reasons. First, the respondent has been in the United States unlawfully since approximately December 17, 2001, when he overstayed his nonimmigrant visa. That is approximately nine and a half years and, therefore, the respondent has shown no respect for the Immigration laws of this country. There is also evidence in the record that the respondent has been employed in the United States and there is no evidence in the record that the respondent has had authorization to work in the United States. The respondent's employment in the United States is based on the respondent's evidence, Exhibit No. 3.

The Court also finds that the 204(c) finding would also warrant against the respondent's request for a continuance being granted as a matter of discretion.

There are some positive factors in the respondent's case that the Court has considered. Of course, his marriage to his

present wife and the fact that the respondent does not appear to have any criminal record. However, these positive factors do not outweigh the negative factors that the Court has stated above.

Based on the totality of circumstances, balancing positive and negative factors in his case, and the fact that the Government has made a prior 204(c) finding based on a petition filed by his first wife, Swykia, the Court finds that a continuance should be denied as a matter of discretion. Accordingly, for the above-stated reasons, the respondent's request for a continuance is denied.

Respondent is seeking no other relief from removal.

Accordingly, the following order shall be entered.

ORDER

IT IS HEREBY ORDERED the respondent's request for a continuance be denied.

IT IS FURTHER ORDERED that respondent shall be removed and deported from the United States to Kenya based on the charge contained upon the Notice to Appear.

DEITRICH SIMS
U.S. Immigration Judge

CERTIFICATE PAGE


I hereby certify that the attached proceeding before
JUDGE DEITRICH H. SIMS, in the matter of:

PATRICK JONAH KAGAU

A 099 258 131

Dallas, Texas

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.


Ann M. Nau, Transcriber
Free State Reporting, Inc.

July 29, 2010
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies
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