U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BROWN, ERROL STAFFORD

A 079-095-690

Date of this notice: 8/19/2014

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:
Manuel, Elise

Userteam: Docket

File: A079 095 690 – Orlando, FL

Date: AUG 19 2014

In re: ERROL STAFFORD BROWN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wayne C. Golding Sr., Esquire

ON BEHALF OF DHS: Elizabeth G. Lang
Assistant Chief Counsel

APPLICATION: Adjustment of status

The respondent, a native and citizen of Jamaica, has appealed from the Immigration Judge's September 18, 2012, decision denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) in conjunction with a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The DHS has filed a brief in opposition. The record will be remanded to the Immigration Judge.

We review the Immigration Judge's findings of fact, including credibility determinations, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge denied the respondent's application for adjustment of status, finding he had not met his burden of proof in that he failed to provide the required affidavit of support (Form I-864), the required report of medical examination (Form I-693), or evidence of qualifying relatives for purposes of adjudication of the waiver. *See* 8 C.F.R. § 1003.2(c)(1); section 212(h)(1)(B) of the Act. On appeal, the respondent argues that he should have been granted a continuance to supplement the record and that the Immigration Judge should have heard the respondent's testimony in support of his application.

As the respondent notes on appeal, the respondent's initial individual hearing date was set for May of 2013. For reasons that are not stated in the record, the hearing date was moved up nearly eight months to September of 2012. The Immigration Judge did not take testimony in support of the application from the respondent or his wife, who was present in the courtroom that day (I.J. at 3). The Immigration Judge denied the application in part because the respondent had not provided a marriage certificate or birth certificates for his children (I.J. at 1-2). The Immigration Judge did note that the respondent had an approved I-130 petition, filed on his behalf by his wife, but did not consider that in determining whether the respondent had established a qualifying relative for purposes of the waiver (I.J. at 3).

As the respondent had timely filed his application for adjustment of status and for the waiver of inadmissibility, the Immigration Judge should have allowed the respondent and his witness to present testimony in support of his application. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010). We agree with the Immigration Judge's determination that the respondent should have supplemented his application with further evidence of his qualifying relatives and the documents required under the regulations. However, in light of the unexplained schedule change of the respondent's individual hearing, as well as the Immigration Judge's failure to hear the respondent's testimony in support of his application, a remand is warranted. Upon remand, it is incumbent upon the respondent, bearing the burden of proof, to support his application with appropriate and necessary evidence, as well as to demonstrate that he merits the relief in the exercise of discretion. In light of the foregoing, the following order will be entered.

ORDER: The record will be remanded to the Immigration Judge for further proceedings and entry of a new order.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ORLANDO, FLORIDA

File: A079-095-690 September 18, 2012

In the Matter of

ERROL STAFFORD BROWN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended (hereinafter "INA" or "the Act"), as an alien who at any time after admission remained in the United States for a time longer than permitted; ~~and~~

237(a)(2)(B)(i) of the Act, as an alien who at any time after admission was convicted of a controlled substance offense, o~~whe~~ther ~~then~~than a single offense involving possession for one's own use of 30 grams or less of marijuana.

APPLICATIONS: Adjustment of status pursuant to INA Section 245, together with a waiver of ground of inadmissibility pursuant to INA Section 212(h).

ON BEHALF OF RESPONDENT: JEAN BERNARD CHERY

ON BEHALF OF DHS: ELIZABETH LANG

ORAL DECISION OF THE IMMIGRATION JUDGE

As noted, the application for the adjustment is being

denied as some of the requirements are that the respondent provide a medical examination. He also has to have an affidavit of support called an I-864 to satisfy the public charge issues, neither which he has. As this is also a REAL ID Act case ~~.~~ the Respondent has the burden of proof. Al~~and~~ though he can testify to maters, it is reasonable to expect that he would have a marriage license of his wife and~~,~~ birth certificates of his children who were born in Florida. The marriage occurred in Florida. It was some nine or ten years ago, according to the testimony of the parties, and as such, the Court finds that certainly for the lack of the medicals and the I-864, he has not satisfied his burden as to the adjustment of status, or proven that he has the relatives for the 212(h) waiver, and so they are denied.

As to the voluntary departure, the Court has to weigh the negative and positive factors. The negative factors are we know that he has this current arrest which would be a second possible drug case. He had the domestic violence, but he testified they both filed against each other, with a lady that he was with during his marriage. He also stated that he has had children outside of marriage. He had the resisting without violence, but that was in 2006, which would have been before the five year statutory period, and the underlying criminal arrest was in 2003.

The Court has heard his lack of funds and that how his

wife was going to help him and that the respondent understands clearly the need to post the voluntary departure bond~~is~~ within the five days. Due to his lack of funds, the Court is going to grant the voluntary departure and set the bond at $500. Obviously, if the respondent appeals and it turns out that he does have the conviction, of course, the Government would be free to have a changed circumstance and then come and seek that. But at this time, the Court is not going to impose more than that. And again, by statute, he cannot have more than 60 days and the Court would give him until November 19, 2012 to depart.

The Court has also considered the fact that he does have an approved I-130 filed by the wife. She did show up today and that if he does leave timely, that he would be able to then request the ability to come back. However, we do realize that there is this outstanding criminal matter which, if he is convicted of a second possession, he will be unable to come back. He would not be eligible for the 212(h), but at this time, he has not been convicted.

So accordingly, the following orders shall be entered:

ORDER

The respondent is removable as charged pursuant to INA Section 237(a)(1)(B) for having failed to depart when required.

IT IS FURTHER ORDERED that respondent's application for adjustment of status pursuant to INA Section 245(i) is denied.

IT IS FURTHER ORDERED that the respondent's request for waiver pursuant to 212(h) is denied.

IT IS FURTHER ORDERED that the respondent's request for voluntary departure has been granted. The respondent is required to leave on or before November 19, 2012, and must post $500 bond within five business days of today.

IT IS FURTHER ORDERED that if respondent does not timely depart from the United States, an order of removal shall be automatically entered against the respondent ordering him removed to Jamaica.

IT IS FURTHER ORDERED that if the respondent fails to timely post the bond, he shall also be ordered removed to Jamaica.

See next page for e. signature

STUART F. KARDEN
Immigration Judge

//s//

Immigration Judge STUART F. KARDEN

kardens on December 3, 2012 at 11:08 PM GMT