U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BAHAMONDE MICHILENA, JAM... **A 088-069-238**

Date of this notice: 12/31/2015

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
Greer, Anne J.
Cole, Patricia A.

Userteam: Docket

File: A088 069 238 – Miami, FL Date: DEC 31 2015

In re: JAMES EDISON BAHAMONDE MICHILENA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew B. Weber, Esquire

ON BEHALF OF DHS: Heidi Shulman-Pereira
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled (found)

APPLICATION: Termination

The respondent appeals from the Immigration Judge's March 4, 2014, decision finding him removable as charged and denying his motion to terminate proceedings. The Department of Homeland Security ("DHS") opposes the appeal. The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7). His appeal will be sustained, and the proceedings will be terminated.

We review findings of fact for clear error, including credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review issues of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent admitted that he is a native and citizen of Ecuador (I.J. at 1-2; Exh. 1; Tr. at 30). As alienage was established, he bears the burden to establish by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. *See* section 240(c)(2)(B) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1229a(c)(2)(B); 8 C.F.R. § 1240.8(c).

The respondent was lawfully admitted to the United States on April 16, 1999, as a nonimmigrant visitor (I.J. at 2-3; Exh. 2; Tr. at 14-15). He denied the factual allegations contained on the Notice to Appear alleging that he entered the United States at an unknown place and time and that he was not then admitted or paroled after inspection by an immigration official (I.J. at 1-2; Exh. 1; Tr. at 30). In support of his argument, he submitted two Arrival/Departure Records ("Forms I-94"), which indicate that he was admitted to the United States in 1995 and again in 1999 as a nonimmigrant visitor (I.J. at 2; Exh. 2).

The DHS submitted a Record of Deportable/Inadmissible Alien ("Form I-213"), which indicates that the respondent was detected by the DHS after he was arrested at Miami International Airport and that, when interviewed by the DHS, the respondent indicated he last entered the United States after 1999 (I.J. at 2-3; Exh. 3). The Form I-213 indicates that the DHS was unable to identify any record of the respondent's lawful admission during this subsequent entry (I.J. at 2-3; Exh. 3 at 1). Based on the evidence contained in the Form I-213, the Immigration Judge determined that the respondent departed the United States after 1999 and returned without inspection and admission or parole (I.J. at 3). Accordingly, he concluded that the respondent is inadmissible under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i) (I.J. at 2-3).

On appeal, the respondent asserts that the Immigration Judge erred in sustaining the charge of inadmissibility, as he gave improper weight to the Form I-213 (Resp. Brief at 2-3). The respondent contends that the Form I-213 only asserts that there is no record of his admission into the United States in 2001, but that the report does not indicate that he departed in 1999 and, thereafter, illegally re-entered the United States (Resp. Brief at 2-3). The DHS argues in support of the admissibility and reliability of the Form I-213 (DHS Brief at 3-6).

Although a Form I-213 kept in the ordinary course of business is generally considered admissible and inherently reliable, we have concerns about the Immigration Judge's reliance on the Form I-213 here, as the form does not accurately reflect the respondent's 1999 admission as evidenced by the Form I-94 (I.J. at 2-3; Exhs. 2-3).[1] *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976); s*ee also Rampasard v. United States Attorney General*, 147 F. App'x 90, 91 (11th Cir. 2005). Instead, because the Form I-213 contains indicia of unreliability, we conclude that the Immigration Judge erred as a matter of law in sustaining the charge of inadmissibility brought under section 212(a)(6)(A)(i) of the Act. Based on the foregoing, we will terminate proceedings. Accordingly, the following orders shall be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The respondent's proceedings are terminated.

FOR THE BOARD

[1] We note that the DHS made no alternative request to lodge charges under section 237 of the Act, 8 U.S.C. § 1227 (Resp. Brief at n.4).

File: A088 069 238 - Miami, FL

Date: DEC 31 2015

In re: JAMES EDISON BAHAMONDE MICHILENA

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent from the majority decision to terminate these proceedings by finding that the Immigration Judge erred as a matter of law in sustaining the charge of inadmissibility. I would affirm the Immigration Judge's finding that, the respondent did not meet his burden in establishing that he is lawfully present in the United States pursuant to a prior admission.

The respondent has been charged under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(6)(A)(i), as an alien who is present in the United States without admission or parole (I.J. at 1-2; Exh. 1). Accordingly, the burden of proof in this matter is governed by section 240(c) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c), which provides that the burden is on the applicant for admission to establish "clearly and beyond doubt" admissibility. The regulation at 8 C.F.R. § 1240.8(c), states that the burden originally rests with the Department of Homeland Security ("DHS") to establish the respondent's alienage. "Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged." 8 C.F.R. § 1240.8(c) (emphasis added). The record indicates that the respondent conceded his alienage, thus shifting the burden of proof from the DHS to him (I.J. at 1-2; Exh. 1; Tr. at 3). *See* section 240(c) of the Act; 8 C.F.R. § 1240.8(c).

The Immigration Judge, as the trier of fact, properly weighed all of the evidence of record and concluded that the respondent last entered the United States and was not inspected and admitted. This determination is subject to clear error review. *See* 8 C.F.R. § 1003.1(d)(3). Moreover, where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)); *see also Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) ("A fact finding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.") (internal citations omitted).

The Immigration Judge found that the Record of Deportable/Inadmissible Alien ("Form I-213") reflected that the respondent departed the United States after 1999 and returned without inspection and admission or parole (I.J. at 3; Exh. 3). He further accorded more weight to the Form I-213 than to the respondent's two Arrival/Departure Records ("Forms I-94"), which indicate that the respondent was admitted in 1995 and again in 1999 as a nonimmigrant visitor (I.J. at 2-3; Exh. 2). In so deciding, the Immigration Judge properly noted that the Form I-213 is considered inherently reliable (I.J. at 2). *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (holding that, absent any indication that it contains information that is incorrect or was

obtained by coercion or duress, a Form I-213 is an inherently reliable document and admissible as evidence to prove alienage or deportability).

I find unavailing the majority's conclusion that the Form I-213 is inherently unreliable here because it lacks information regarding the respondent's 1999 "admission." Instead, it is the respondent's burden to present evidence regarding his purported "admission." The respondent's evidence of a prior lawful admission and testimony that he departed the United States is not clear and convincing evidence of a subsequent lawful admission to the United States.

Thus, the Immigration Judge's factual findings are not clearly erroneous, and he correctly found removability established based on the respondent's failure to meet his burden of proof to establish his lawful admission. Accordingly, I would dismiss the respondent's appeal and affirm the Immigration Judge's decision..

Patricia A. Cole
Board Member

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

File: A088-069-238 March 4, 2014

In the Matter of

JAMES EDISON BAHAMONDE MICHILENA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act — Present in the United States without being admitted or paroled.

APPLICATION: Termination.

ON BEHALF OF RESPONDENT: MATTHEW B. WEBER, Esquire

ON BEHALF OF DHS: HEIDI SHULMAN-PEREIRA, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Ecuador who was issued a Notice to Appear by the Department of Homeland Security (DHS) which charged him with removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act) as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. Exhibit 1.

At a prior hearing, the respondent admitted Allegations 1 and 2 in the Notice to

Appear, while denying Allegations 3 and 4 and the charge of removability.

The respondent informed the Court that he would be filing a motion to terminate with proof of his lawful admission to the United States.

At the hearing today, the Court asked the respondent whether he had filed a motion to terminate because there was no record of such a filing in the record of proceedings. The respondent indicated that a motion would not be necessary and tendered to the Court copies of two I-94's issued by U.S. Immigration. The respondent then stated that said I-94's were proof of his lawful admission to the United States and requested the Court to terminate the proceedings.

The DHS has submitted an I-213 Record of Deportable/Inadmissible Alien into evidence. The respondent objected to the admission of the I-213. DHS argues that, per the I-213, the respondent was encountered on April 23, 2013, and that a review of its databases did not reflect an entry pursuant to a lawful admission.

The respondent argues that the I-213 is double hearsay and should be given less weight than the I-94's which the respondent characterized as hard evidence in this case.

The Court has considered the evidence filed by both parties, namely, the I-94 stamps filed by the respondent and the I-213 filed by the Government and finds that the I-213 should be given the greater weight in this case. Although counsel has objected to the admission of the Form I-213 into evidence, he has not established that the contents of the I-213 do not relate to the respondent or that the information was erroneous or the result of duress or coercion by the Government. Normally, an I-213 is considered to be an inherently trustworthy document and admissible as evidence in a removal case to establish the charge of removability. The Court finds no reason to deviate from this accepted practice in this case.

Although the respondent apparently was admitted to the United States on April

16, 1999 as a B2 visitor for six months (the DHS argues and the respondent has not refuted that the other I-94 relates to a parole in 1995) it appears that the respondent, according to the I-213, departed the United States after 1999 and reentered the United States without being inspected and admitted by an Immigration Officer.

Accordingly, the respondent's ore tenus motion to terminate will be denied and the charge under Section 212(a)(6)(A)(i) of the Act will be sustained.

The respondent has designated Ecuador for purposes of removability.

The respondent was offered the opportunity to apply for voluntary departure but, "We're going to appeal." Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent shall be removed from the United States to Ecuador pursuant to Section 212(a)(6)(A)(i) of the Act.

Dated this 4th day of March, 2014.

SCOTT G. ALEXANDER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE SCOTT G. ALEXANDER, in the matter of:

JAMES EDISON BAHAMONDE MICHILENA

A088-069-238

MIAMI, FLORIDA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

JUDITH MOORE (Transcriber)

FREE STATE REPORTING, Inc.-2

APRIL 10, 2014

(Completion Date)