



U.S. Department of Justice

Executive Office for Immigration Review

***Board of Immigration Appeals
Office of the Clerk***

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**DHS/ICE Office of Chief Counsel - BUF
130 Delaware Avenue, Room 203
Buffalo, NY 14202**

Name: SINCLAIR, RICARDO J.

A095-965-914

Date of this notice: 6/23/2011

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.
Guendelsberger, John
Holmes, David B.**

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A095 965 914 - Buffalo, New York

Date:

JUN 23 2011

In re: RICARDO J. SINCLAIR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Allen W. Farabee, Esquire

ON BEHALF OF DHS: Carol G. Bridge
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Jamaica, has timely appealed from an Immigration Judge's May 26, 2009, decision. In that decision, the Immigration Judge denied the respondent's timely motion to reopen removal proceedings so as to allow the Immigration Judge to consider the respondent's request for voluntary departure. The Department of Homeland Security ("DHS") affirmatively indicated its non-opposition to the respondent's motion, and on appeal, the DHS states that it "continues to not oppose said motion." The appeal will be sustained, the proceedings will be reopened, and the record will be remanded to the Immigration Court for further proceedings in accordance with this opinion and the entry of a new decision.

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

We note the respondent seeks to reopen the proceedings in order to pursue an application for post-hearing voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). We note that on appeal, the DHS has reaffirmed its expressed non-opposition to the respondent's motion, and also noted that "upon further review of this matter, [it] would not oppose a grant of voluntary departure." We consider that reopening is usually granted where both

parties have affirmatively agreed to the reopening of proceedings and the respondent has provided *prima facie* eligibility for the relief sought absent unusual circumstances not presented here.¹

The law provides an alien the right to request relief from removal, including voluntary departure. See 8 C.F.R. § 1240.11(b). Because the Immigration Judge has not addressed whether the respondent was advised of this potential avenue of relief from removal, and was provided an opportunity to apply for relief he is statutorily eligible for, we will remand the record to enable the Immigration Judge to do so.

Accordingly, the respondent's appeal will be sustained, the instant removal proceedings will be reopened, and the record will be remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision.

ORDER: The appeal is sustained.

FURTHER ORDER: The proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision



FOR THE BOARD

¹ Although the record reflects that the respondent renewed his petition for the termination of his conditional permanent resident status before the Immigration Court, the Immigration Judge premised his denial on a finding that the respondent had not presented sufficient evidence as to the marital *bona fides*. However, we note that the failure to produce affirmative evidence of the *bona fides* of the marriage, by itself, is not sufficient to establish that the marriage is a sham marriage. Compare 8 C.F.R. § 204.2(a)(1)(iii)(B), (D) with 8 C.F.R. § 204.2(a)(1)(ii). There was no finding of "marriage fraud" in this case. There is no admission of collusion to evade the immigration laws. There is no evidence that the petitioner was paid to marry the beneficiary. There is no evidence that the marriage was never consummated, that the parties never cohabited, or that the parties did not hold themselves out as married to family and friends. The removal of condition was denied because of the respondent's failure to present sufficient evidence to prove the *bona fides* of the marriage. To the extent the Immigration Judge's denial of the respondent's motion to reopen suggests otherwise, it is not supported by the record.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
130 DELAWARE AVENUE, SUITE 410
BUFFALO, NY 14202

LAW OFFICE OF ALLEN W. FARABEE
FARABEE ESQ., ALLEN W.
P.O. BOX 139
BUFFALO, NY 14213

IN THE MATTER OF
SINCLAIR, RICARDO J.

FILE A 095-965-914

DATE: Jun 1, 2009

___ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X_ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
130 DELAWARE AVENUE, SUITE 410
BUFFALO, NY 14202

___ OTHER: _____

COURT CLERK
IMMIGRATION COURT

FF

CC: STEVEN J. CONNELLY, ASSISTANT CHIEF COUNSEL
130 DELAWARE AVE., SUITE 203
BUFFALO, NY, 142020000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BUFFALO, NEW YORK

IN THE MATTER OF

FILE: A095 965 914

Richardo SINCLAIR

In REMOVAL Proceedings

ON BEHALF OF RESPONDENT

Allen W. Farabee, Esq.
P.O. Box 139
Buffalo, NY 14213

ON BEHALF OF DHS

Office of Chief Counsel
Department of Homeland Security
130 Delaware Avenue, Room 203
Buffalo, NY 14202

ORDER OF THE U.S. IMMIGRATION JUDGE

Respondent's Motion to Reopen is **DENIED**. Respondent was found "not" to have entered into a good faith marriage and therefore the court would not agree to a reopening for that purpose.

DONE and ORDERED this 26th day of May, 2009 at Buffalo, New York.

Philip J. Montante, Jr.
U.S. Immigration Judge

BOARD OF
IMMIGRATION APPEALS
CLERK

JUN 25 P 12:11

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW