U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: DAUPHIN, EINSTEIN MARKOV **A 099-508-343**

Date of this notice: 8/24/2016

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:
O'Herron, Margaret M
Cole, Patricia A.
Pauley, Roger

Userteam: Docket

File: A099 508 343 – Atlanta, GA

Date: AUG 24 2016

In re: EINSTEIN MARKOV DAUPHIN

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Khadizeth F. Toure-Samba, Esquire

ON BEHALF OF DHS: Greg Radics
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 (sustained)

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Convicted of crime involving moral turpitude (withdrawn)

APPLICATION: Reopening; remand

In a written decision rendered April 7, 2015, the Immigration Judge denied the respondent's timely motion to reopen to pursue adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The respondent has appealed that decision and submits new evidence of his eligibility for adjustment of status on appeal that we will construe as a motion to reopen and remand. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained, proceedings will be reopened, and the record will be remanded for the entry of a new decision.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also 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 questions of law, discretion, or judgement, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Haiti (I.J. at 1; Exh. 1). In the course of his removal proceedings, the respondent was granted a number of continuances for the filing of any and all applications for relief from removal (I.J. at 2). When the respondent did not present any applications at his July 14, 2014, hearing, the Immigration Judge ordered him removed (I.J. at 2).

On October 14, 2014, the respondent filed a timely motion to reopen, alleging that: (1) he had obtained a divorce that day; (2) he had plans to marry imminently; (3) his future spouse, a United States citizen, would be filing a Petition for Alien Relative (Form I-130) on his behalf; and (4) he needed an additional 45 days to supplement the motion with evidence regarding the bona fide nature of his future marriage (I.J. at 2; Resp. Motion to Reopen at 3, Attachment).

The DHS opposed the motion (I.J. at 2). On April 7, 2015, the Immigration Judge denied the respondent's motion to reopen, finding he was not eligible for relief, as he was not yet remarried (I.J. at 3-5). Furthermore, the Immigration Judge found equitable tolling was not warranted (I.J. at 5).

However, prior to the Immigration Judge's decision, on February 23, 2015, the respondent submitted a copy of the visa petition filed by his new spouse, the fee receipt issued by United States Citizenship and Immigration Services accepting the visa petition for processing, and his application for adjustment of status (Resp. Feb. 23, 2015, Documentary Submission). The Immigration Judge did not address this evidence in his April 7, 2015 decision.

We agree with the respondent that equitable tolling of the motion deadline was warranted to allow him to supplement the record with evidence of his prima facie eligibility for adjustment of status. *See Avila-Santoyo v. United States Att'y Gen.*, 713 F.3d 1357, 1362-65 (11th Cir. 2009) (recognizing the applicability of the concept of equitable tolling). The respondent has been present in the United States for approximately 30 years and with his appeal has submitted additional documentation, including a marriage certificate and evidence of the bona fides of his current marriage (Resp. Brief at Tabs B-G). Moreover, the record contains persuasive evidence indicating that, should a visa petition be approved on the respondent's behalf, he would likely qualify as a grandfathered alien under section 245(i) of the Act for purposes of adjustment of status (Exh. 4(I)).[1]

On remand, the Immigration Judge should consider any and all documentary and testimonial evidence, including but not limited to the respondent's eligibility for adjustment of status. We express no opinion as to the proper disposition in these proceedings.

Accordingly, the following orders are entered.

ORDER: The appeal is sustained and proceedings are reopened.

FURTHER ORDER: The record is remanded for further proceedings consistent with this decision, and for the entry of a new decision.

FOR THE BOARD

[1] The respondent conceded, and the Immigration Judge found him removable for, entering on an unknown date, at an unknown place, without being inspected and admitted or paroled such that he would be statutorily ineligible for adjustment of status under section 245(a) of the Act (I.J. at 1; Exhs. 1, 2).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF:	)	**In Removal Proceedings**
	)	
DAUPHIN, Einstein Markov	)	**File No. A# 099 508 343**
	)	
Respondent	)	
	)	

APPLICATION: Respondent's Motion to Reopen

APPEARANCES

ON BEHALF OF THE RESPONDENT:

Khadizeth Toure-Samba, Esq.
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Decatur, Georgia 30032

ON BEHALF OF THE GOVERNMENT:

Assistant Chief Counsel
Department of Homeland Security
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Atlanta, Georgia 30303

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Einstein Markov Dauphin ("Respondent") is an adult male native and citizen of Haiti. He entered the United States at an unknown place and on an unknown date, and was not then admitted or paroled after inspection by an Immigration Officer.

On July 3, 2012, the Department of Homeland Security ("Department") issued a Notice to Appear ("NTA") charging the Respondent as removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act" or "INA"). The Department provided Respondent with a copy of the NTA in person on that date.

While Respondent was represented by his former counsel, Ms. Constance Daise, Esq., the Court granted three continuances for Respondent to file the proper applications and documentation with the Court. On September 12, 2012, at Respondent's fifth hearing, Respondent remained unable to produce the required documentation establishing that his United States citizen wife had filed an I-130 Petition for Alien Relative ("I-130") on Respondent's behalf with the United States Citizenship and Immigration Service ("USCIS"). At this time, the Court ordered Respondent removed to Haiti, but noted that it would be willing to consider reopening the case if Respondent timely filed a motion to reopen presenting evidence that USCIS received an I-130 filed on his behalf.

On October 15, 2012, Respondent filed a Motion to Reopen, which included a receipt notice from USCIS for an I-130 filed on Respondent's behalf by his United States citizen spouse. The Department filed a Non-opposition to Respondent's Motion to Reopen on November 8, 2012. The Court granted Respondent's Motion to Reopen on April 22, 2013.

On June 10, 2013, Respondent had a master calendar hearing where he was represented by Ms. Constance Daise, Esq. At the following hearing on March 25, 2014, Respondent appeared *pro se*, and requested a continuance to obtain an attorney. At Respondent's subsequent hearing on May 12, 2014, Respondent again appeared *pro se*. He indicated that his prior I-130 was denied for lack of evidence, because it had been filed with only the marriage certificate. See Digital Audio Recording ("DAR") at 00:00:50-00:01:12 (May 12, 2014). Respondent said that he had not refiled the I-130. He indicated that he was still married to his wife, but that they were not living together. See DAR at 00:01:12-00:02:51 (May 12, 2014). He further indicated that he had researched attorneys, but had not hired an attorney at that time. See DAR at 00:02:51-00:04:12 (May 12, 2014). The Court granted Respondent a final continuance, but made it very clear to him that if he chose to represent himself, he needed to be prepared to file the necessary documentation at the next hearing. See DAR at 00:04:13-00:18:00 (May 12, 2014). The Court reiterated the seriousness of the proceedings to Respondent, and the fact that the Court would not grant a further continuance to the Respondent for the same reason. See id.

At the Respondent's final hearing before the Court, on July 14, 2014, Respondent appeared *pro se* and indicated that he had looked into hiring a lawyer, but had not done so. See DAR at 00:00:01-00:01:00 (July 14, 2014). He said he would like to have his United States citizen brother file an I-130 on his behalf, or possibly file an EOIR Form-42B. See DAR at 00:01:00-00:02:35 (July 14, 2014). Respondent presented the Court with no applications for relief. The Court ordered the Respondent removed based on its finding that removability had been established by clear and convincing evidence and Respondent had not filed for any form of relief.

On October 14, 2014, Respondent filed a Motion to Reopen in which he indicated that he had obtained a divorce from his previous wife, Rachel Leighann Dauphin, on October 14, 2014, and that he would be marring Mickey Gladden, a United States citizen, "this week." See Resp't's Mot. to Reopen (October 14, 2014). Since Respondent's Motion to Reopen was filed on the last day of the 90 day period for the filing of motions to reopen, Respondent requested 45 days from that date in order to supplement the motion "with irrefutable evidence establishing the fact that indeed [Respondent and Mickey Gladden] have a bona fide relationship along with copy [sic] of the I-130 Petition for Alien Relative and all other pertinent documents." See Resp't's Mot. to Reopen (October 14, 2014), Affidavit. Furthermore, Respondent stated that he and Mickey Gladden "are getting married within the week of October 13, 2014, right after the finalization of [Respondent's] divorce." See id.

The Department filed an Opposition to Respondent's Motion to Reopen on October 30, 2014. On February 23, 2015, Respondent filed a supplement to his Motion to Reopen, in which he included: a receipt notice from USCIS for the filing of an I-130 on Respondent's behalf by a United States citizen spouse; a copy of the I-130 petition; and a copy of an I-485 Application for Adjustment of Status.

II. Statement of Law

Generally, a motion to reopen must be filed within ninety days of the final administrative order of removal. 8 C.F.R. § 1003.23(b)(1). A respondent may file only one motion reopen proceedings to before the Immigration Court. 8 C.F.R. § 1003.23(b)(1). All motions to reopen must state new facts that will be proven at a hearing if the motion is granted, and must be supported by affidavits and other evidentiary material. See 8 C.F.R. § 1003.23(b)(3); see also INS v. Abudu, 485 U.S. 94 (1988). Importantly, a motion to reopen will not be granted unless the Court finds that "that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." See 8 C.F.R. § 1003.23(b)(3).

Additionally, a motion to reopen will be denied unless the respondent establishes a *prima facie* case of eligibility for the underlying relief sought. See Matter of S-V-, 22 I&N Dec. 1306, 1307 (BIA 2000) (citing Abudu, 485 U.S. at 94); see also INS v. Doherty, 502 U.S. 314, 315 (1992). The Board has held that a respondent seeking to reopen proceedings to pursue a discretionary grant of relief bears a "heavy burden" and must present "evidence of such a nature that the Board is satisfied that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992). Moreover, if the ultimate relief is discretionary, the Immigration Judge may deny a motion to reopen even if a respondent demonstrates *prima facie* eligibility for relief. See 8 C.F.R. § 1003.23(b)(3); Abudu, 485 U.S. 94.

The Supreme Court has held that "motions to reopen are disfavored" and "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." See Abudu, 485 U.S. at 107. "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." Doherty, 502 U.S. at 323 (internal citations omitted).

The Court has carefully reviewed the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Reopen.

III. Discussion

A. Respondent timely filed a Motion to Reopen.

According to applicable regulations, when computing the period of time for filing a motion, the term day "includes Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday." 8 C.F.R. § 1001.1(h). Here, the Court most recently ordered Respondent removed on July 14, 2014. See Record of Proceedings, IJ Removal Order (November 14, 2014). Respondent filed a Motion to Reopen on October 14, 2014, which was thirty-two days after the issuance of the removal order.

However, the thirtieth day after the issuance of the removal order fell on a Sunday, and the thirty-first fell on a federal holiday. Thus, Respondent's filing of his Motion to Reopen on the subsequent Tuesday, October, 2014, was timely.

B. Respondent's Motion did not present new facts which were unavailable at the time of the hearing, and the Motion was effectively a request for equitable tolling of the filing deadline.

Respondent's Motion to Reopen merely listed what he intended to do, specifically, to marry Mickey Gladden, a United States citizen, "within the week of October 13, 2014" and to supply the Court "with irrefutable evidence establishing the fact that indeed [Respondent and Mickey Gladden] have a bona fide relationship along with copy [sic] of the I-130 Petition for Alien Relative and all other pertinent documents" within 45 days from the filing of the Motion to Reopen. See Resp't's Mot. to Reopen (October 14, 2014), Affidavit. At the time Respondent filed his Motion to Reopen, he did not claim to be eligible for any relief, and thus did not present the Court with any evidence of relief which was new or previously unavailable. However, a motion to reopen will not be granted unless the Court finds that *"that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."* See 8 C.F.R. § 1003.23(b)(3) (emphasis supplied). In the present case, the Respondent only alleged that he expected to be eligible for relief at some point in the future. Effectively, he was requesting that the Court equitably toll the deadline for him to file a motion to reopen, which would contain new and previously undiscoverable evidence as opposed to speculative assertions, for 45 days.

While the Court acknowledges that the Eleventh Circuit has held that the filing deadline for motions to reopen can be equitably tolled, the Court finds Respondent has not established sufficient cause for equitable tolling in his case. See Avila-Santoyo v. U.S. Atty. Gen., 713 F.3d 1357, 1362 (11th Cir. 2013). The Eleventh Circuit has held that, generally, equitable tolling "requires a litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Ruiz-Turcios v. U.S. Atty. Gen., 717 F.3d 847, 851 (11th Cir. 2013).

Respondent has not pursued his case diligently since the time he was placed into proceedings. After Respondent was ordered removed for failure to present the Court with an application for relief, the Court reopened Respondent's case and accorded him *two additional* continuances in order to file for relief from removal with the Court or to retain an attorney to file relief on his behalf. The Court explained to Respondent the importance of filing for relief, and the consequences of failing to do so. However, Respondent continuously failed to comply with the Court's order. Thus, the Court finds that the circumstances in this case do not merit equitable tolling. See id.

C. Respondent has not established prima facie *eligibility for the relief sought.*

A motion to reopen will be denied unless the respondent establishes a *prima facie* case of eligibility for the underlying relief sought. See Matter of S-V-, 22 I&N Dec. 1306, 1307 (BIA 2000) (citing Abudu, 485 U.S. at 94); see also I.N.S. v. Doherty, 502 U.S. 314, 315 (1992). In

the affidavit included in his Motion to Reopen, he indicated that he would file "irrefutable evidence establishing the fact that indeed [Respondent and Mickey Gladden] have a bona fide relationship". See Resp't's Mot. to Reopen (October 14, 2014), Affidavit. However, Respondent failed to file *any* evidence in support of his I-130. Despite admitting to the Court on May 12, 2014, that his prior I-130 had been denied for lack of evidence because it had only included the marriage certificate, Respondent unexplainably declined to attach even a copy of his marriage certificate to the supplement he filed to his latest Motion to Reopen. See DAR at 00:00:50-00:01:12 (May 12, 2014). The Court is presented with no evidence of the marriage, and certainly no evidence of a *bona fide* marriage. Therefore, the Court finds Respondent has failed to establish *prima facie* eligibility for adjustment of status based on an approvable I-130.

D. The Court will deny Respondent's Motion to Reopen as a matter of discretion.

In all motions to reopen, the Court may deny the motion as a matter of discretion. Specifically, where the ultimate form of relief sought is discretionary, the Court is permitted to deny the motion to reopen as a matter of discretion, even if Respondent has established a *prima facie* case for relief.[1] See 8 C.F.R. § 1003.23(b)(3); see Abudu, 485 U.S. 94. The Court notes that the Respondent demonstrated a significant lack of due diligence in pursuing his case previously, when following the reopening of his case on April 22, 2013. Respondent is asking the Court to reopen his case now after presenting the Court with even less information than he presented to the Court in his Motion to Reopen filed prior to the April 22, 2013 reopening.

Considering the multitude of opportunities Respondent has been afforded by this Court to demonstrate due diligence in his case and present the Court with the documentation required for relief, Respondent has repeatedly failed to file "irrefutable evidence establishing the fact that indeed [Respondent and Mickey Gladden] have a bona fide relationship" as he indicated he would. See Resp't's Mot. to Reopen (October 14, 2014); Resp't's Supp. (February 23, 2015). Therefore, even if the Court found the Respondent had timely filed his Motion to Reopen, which included new and previously unavailable evidence and established *prima facie* eligibility for relief, the Court would deny the Motion to Reopen as a matter of discretion. 8 C.F.R. § 1003.23(b)(1).

In light of the foregoing, the Court will enter the following orders:

ORDER

It is ordered that: The Respondent's Motion to Reopen is hereby **DENIED**.

4/7/16
Date

Madeline García
United States Immigration Judge
Atlanta, Georgia

[1] The Court notes that it specifically finds that Respondent has not established *prima facie* eligibility for relief.