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 - BAL
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Name: MPAMBILE, JOSEPH ADAMS **A097-962-673**

Date of this notice: 3/3/2011

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:
Guendelsberger, John

File: A097 962 673 - Baltimore, MD

Date: MAR - 3 2011

In re: JOSEPH ADAMS MPAMBILE

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Oscar L. Amorow, Esquire

ON BEHALF OF DHS: Roger K. Picker
Assistant Chief Counsel

APPLICATION: Reopening; remand

The respondent, a native and citizen of Tanzania, appeals the Immigration Judge's decision dated April 3, 2009, denying his motion to reopen an oral decision dated January 21, 2009, ordering him removed to Tanzania. On appeal, the respondent filed a motion for remand for an opportunity to pursue adjustment of status pursuant to an approved visa petition (Form I-130) filed on his behalf by his United States citizen wife. The Department of Homeland Security (DHS) filed a motion for summary affirmance regarding the appeal but has not responded to or opposed the respondent's request for a remand. The record will be remanded.

The record reflects that the respondent entered the United States in June 1994 on a student visa and his legal status terminated on or before August 1, 2003. Removal proceedings began with service of the Notice to Appear on November 19, 2007. In an oral decision dated January 21, 2009, the Immigration Court ordered the respondent removed. On February 17, 2009, the respondent filed a motion to reopen with the Immigration Court, noting that his United States citizen spouse had filed a Form I-130 visa petition on his behalf. He also submitted two birth certificates demonstrating that he and his current United States citizen wife are the parents of two United States citizen children. The Immigration Judge denied the motion to reopen in a decision dated April 3, 2009. The respondent appealed. During the pendency of this appeal, the respondent submitted a motion to remand, received on June 28, 2010, with evidence that the visa petition filed on his behalf on February 4, 2009, was approved on May 25, 2010. The DHS has not responded to the respondent's motion to remand.

Further, during the pendency of this appeal, the Board issued its decision in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), where we held, in pertinent part, that in determining whether good cause exists to continue proceedings for the adjudication of a pending family-based visa petition, a variety of factors may be considered, including, but not limited to: (1) the Department of Homeland Security's response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason

for the continuance and any other relevant procedural factors. Although the current case does not involve a motion to continue, it involves a motion to reopen and a request for a remand in order for the respondent to have the opportunity to pursue adjustment of status based on the approved visa petition filed on his behalf by his United States citizen spouse.

In light of the circumstances in this case, including that the DHS has not opposed the respondent's request for a remand, the respondent has a United States citizen spouse and two United States citizen children, and a visa petition has been approved on the respondent's behalf, the Board finds that a remand is warranted. The record will be remanded in order to permit the respondent an opportunity to apply for adjustment of status.

ORDER: The record is remanded for further proceedings consistent with the above.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

AMOROW & TACHIE MENSON, P.A.
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6495 NEW HAMPSHIRE AVE, STE.318
HYATTSVILLE, MD 20783

IN THE MATTER OF FILE A 097-962-673 DATE: Apr 6, 2009
MPAMBILE, JOSEPH ADAMS

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

xx 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
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

__ OTHER: _____

W. CHAMBERS
COURT CLERK
IMMIGRATION COURT FF

CC: DHS, ICE, OFFICE OF THE CHIEF COUNSEL
31 HOPKINS PLAZA 7TH FLOOR
BALTIMORE, MD, 212010000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
MPAMBILE, Joseph Adams	)	**CASE A# 97-962-673**
RESPONDENT	)	

CHARGE: **Section 237(a)(1)(C)(i) of the Immigration and Nationality Act (INA),** as amended, in that after admission as a nonimmigrant under section 101(a)(15) of the INA, you failed to maintain or comply with the conditions of the nonimmigrant status under which you were admitted.

APPLICATION: Motion to Reopen Removal Proceedings

ON BEHALF OF RESPONDENT
Oscar L. Amorow, Esq.
Amorow & Tachie-Menson, P.A.
6475 New Hampshire Ave., Suite 301
Hyattsville, MD 20783

ON BEHALF OF THE DHS:
Leslie S. Turner, Esq.
Assistant Chief Counsel, DHS
31 Hopkins Plaza, 7th Floor
Baltimore, MD 21201-2825

DECISION AND ORDER ON RESPONDENT'S MOTION TO REOPEN

I. Procedural History

The Respondent is a native and citizen of Tanzania. The Department of Homeland Security (DHS) served the Respondent with a Notice to Appear (NTA) on November 19, 2007. The NTA alleges that the Respondent: (1) is not a citizen or national of the United States; (2) is a citizen or native of Tanzania; (3) was admitted to the United States at or near Washington, D.C. on or about June 19, 1994 as a nonimmigrant F-1 student with authorization to remain until the duration of his status; (4) was admitted to Strayer University located in Washington, D.C.; and (5) his status terminated on or before August 1, 2003, as he was not entered in the Student & Exchange Visitor Information System (SEVIS) as required. As such, the Respondent was charged with removability pursuant to **INA § 237(a)(1)(C)(i).**

During a Master Calendar hearing on January 23, 2008, the Respondent admitted all allegations contained in the NTA and conceded to the charge. Following removal proceedings, this Court in an oral decision ordered the Respondent removed on January 21, 2009 to Tanzania.

Subsequently, the Respondent filed a Motion to Reopen with the Court on February 17, 2009 pursuant to 8 C.F.R. § 1003.23.

II. Statement of Law and Findings of the Court

The Court has considered the entire record carefully. The Respondent does not have an approved I-130 petition demonstrating he would be eligible for adjustment of status and therefore has not established prima facie eligibility for relief. ***See* 8 C.F.R. 1003.23(b)(3).** In order to adjust status the Respondent must (1) make an application for adjustment, (2) be eligible to receive an immigrant visa and admissible to the United States for permanent residence, and (3) have an immigrant visa immediately available to him at the time his application is filed. ***See* INA § 245(a).** An alien spouse of a U.S. citizen with an approved I-130 petition is immediately eligible to receive a visa. ***See* INA § 201(b)(2)(A)(I).**

An alien seeking to adjust status based on a marriage entered into while in removal proceedings must demonstrate by "clear and convincing evidence" that the marriage was entered into in "good faith" and "not entered into for the purpose of procuring the alien's admission as an immigrant." ***See* INA § 245(e).** An application for adjustment of status may not be filed until the I-130 is approved when it is based upon a marriage entered into during removal proceedings. ***See Matter of H-A-*, 22 I & N Dec. 728 (BIA 1999).**

An approved I-130 visa petition is unequivocal evidence of the bona fides of a marriage entered into during removal proceedings; however, other evidence may establish by clear and convincing evidence that the marriage was entered into in good faith and not for the purpose of procuring lawful immigration status, such as "birth certificates of children born to the applicant and his or her spouse." ***See* 8 C.F.R. 124.1(c)(8)(v)(D), 245.1(c)(8)(v)(D).**

The Respondent married his U.S. citizen spouse, Mpambile Darline Tatia, while he was in removal proceedings. The Respondent submitted the birth certificates of his children evidencing he is the father and his spouse is the mother. In his Motion to Reopen, the Respondent asserts the birth of his U.S. citizen twins with his spouse is clear and convincing evidence that he entered into a good faith marriage and therefore there is no restriction to his adjustment of status pursuant to **INA § 245(e)**.

The Respondent filed an I-130 visa application on February 4, 2009 with United States Citizenship and Immigration Services (USCIS). The authority to adjudicate the Respondent's I-130 petition rests with USCIS. ***See* 8 C.F.R. § § 245.2(a), 1245.2(a)(1).** Any inquiry by the Court to determine whether the Respondent's I-130 application demonstrates prima facie eligibility would require an in-depth examination into the merits of the petition and constitute an "unwarranted intrusion into the district director's authority over the adjudication of visa petitions." ***See Matter of Arthur*, 20 I & N Dec. 475 (BIA 1992).** This Court is not permitted to make any determinations about the bona fides of the marriage because jurisdiction to make this determination rests with USCIS and therefore the Respondent has not demonstrated to this Court he is prima facie eligible for an I-130 immigrant visa.

The Respondent has not demonstrated prima facie eligibility for relief based on adjustment of status in connection with an approved I-130 alien relative petition and therefore has presented no new, material facts to support his Motion to Reopen.

Assuming the Respondent has established prima facie eligibility for relief, "(T)he Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief. ***See* 8 C.F.R. 1003.23(b)(3).** The Court would still be inclined to deny the Respondent's Motion to Reopen because of the length of his unlawful presence in the United States of at least four and a half years, beginning with the termination of his non-immigrant status on or before August 1, 2003 through the present.

For the foregoing reasons, the Respondent's Motion to Reopen is **DENIED.**

It is this 3rd day of April 2009, by the United States Immigration Court, sitting at Baltimore, Maryland,

4/3/09
Date

Phillip T. Williams
United States Immigration Judge
Baltimore, Maryland