



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: ASAMOA, ERNEST ANTWI

A 087-310-643

Date of this notice: 9/11/2015

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:
Mullane, Hugh G.
Creppy, Michael J.
Malphrus, Garry D.

avlon
User team: Docket

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Falls Church, Virginia 20530

File: A087 310 643 – Boston, MA

Date:

SEP 11 2015

In re: ERNEST ANTWI ASAMOAH a.k.a. Ernest Asamoah Antwi
a.k.a. Ernest Asamoah-Antwi a.k.a. Ernest Asamoahantwi

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Obadan Iziokhai, Esquire

APPLICATION: Adjustment of status

The respondent, a native and citizen of Ghana, appeals from an Immigration Judge's decision dated August 13, 2013, denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The appeal will be sustained and the record remanded for further proceedings.

We review the findings of fact, including determinations of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether or not 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 respondent has an approved visa petition. The Immigration Judge found, however, that the respondent failed to meet his burden to establish eligibility for adjustment of status under section 245 of the Act. On his adjustment application (Form I-485), the respondent indicated that he had never been arrested, whereas he was arrested and pled guilty to driving while intoxicated on June 11, 2009 (Exhs. 6 and 7). The respondent swore to the truthfulness of the Form I-485 (Tr. at 43-44).

The Immigration Judge noted that the respondent is required to satisfy the applicable eligibility requirements, and one of those requirements is that he submit an application that is accurate and complete. The Immigration Judge then found that the application was neither accurate nor complete, as it did not reflect the arrest. The Immigration Judge, therefore, found the respondent failed to demonstrate his eligibility for adjustment (I.J. at 5-6). While an accurate and complete application for relief is of paramount importance, the omission here does not make him ineligible for relief.¹

There is no error in the Immigration Judge's finding that the respondent intentionally omitted his driving while intoxicated offense from his application. The respondent's false statement,

¹ It does not appear that the Department of Homeland Security (DHS) argued that respondent was ineligible (Tr. at 46-47). Instead, it appears that DHS argued that the Immigration Judge should consider this issue in the exercise of discretion.

however, is properly considered in the exercise of discretion, rather than as an outright bar to his application. This situation is analogous to *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010) where we held that failure to file supporting documents was not an adequate reason to conclude that the application was abandoned. The falsity of the respondent's application and his statements concerning the errors, like the offense itself, are significant factors in the exercise of discretion for the Immigration Judge to consider. However, these circumstances do not render the respondent statutorily ineligible.

We will remand the record for the Immigration Judge to consider respondent's adjustment of status application in the exercise of discretion. Nothing in our remand is intended to indicate a particular result regarding in the exercise of discretion. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings and the entry of a new decision.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A087-310-643

August 13, 2013

In the Matter of

ERNEST ANTWI ASAMOAH

RESPONDENT

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)
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)

IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Adjustment of status.

ON BEHALF OF RESPONDENT: OBADAN IZIOKAHAI

ON BEHALF OF DHS: JENNIFER MULCAHY

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in these proceedings is an adult, male, native and citizen of Ghana. The respondent was placed into removal proceedings through the issuance of a Notice to Appear dated April 22, 2009. See Exhibit 1. That document is also known as a form I-862. The respondent submitted written pleadings through counsel. See Exhibit 2. In those written pleadings, the respondent admits allegations 1 through 4 and concedes the one charge under Section 237(a)(1)(B) of the Act. The respondent does designate Ghana as the country for removal purposes and seeks only adjustment

of status as a form of relief.

Based upon those written pleadings at Exhibit 2, this Court does find that removability has been established by evidence that is clear and convincing. This Court does designate Ghana as the country for removal purposes.

Initially, the respondent did provide ~~the respondent~~ an I-130 petition for alien relative package at Exhibit 3 for identification. However, the respondent has not proceeded to adjust his status based upon an I-130, but instead seeks to adjust his status based upon an approved I-360, self-petition based upon the subsection in part 2 of the I-360, self-petitioning spouse of abusive U.S. citizen or lawful permanent resident. The Department of Homeland Security agrees the respondent's I-360 has been approved. The respondent submitted an adjustment of status application to this Court and the documents attached thereto at Exhibit 6. This Court has conducted a full hearing on the respondent's adjustment application and this Court's decision follows below.

ANALYSIS AND DECISION

The respondent has filed his application for adjustment with this Court on June 6, 2013. See Exhibit 6. Therefore, the REAL ID Act of 2005 applies to the respondent's application for adjustment of status as the REAL ID Act is effective for applications filed on or after May 11, 2005. The respondent, in applying for relief from removal, has the burden to establish that he satisfies the applicable eligibility requirements and with respect to any form of relief that is granted in the exercise of discretion, that he merits a favorable exercise of discretion. [INA Section 240(c)(4)][8 U.S.C. 1229(a)]. In sustaining the respondent's burden, the respondent must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or regulation or in

the instructions for the application form. In evaluating the testimony of the respondent, the Court will determine whether or not the testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the respondent has satisfied his burden of proof. In determining whether the respondent has met such a burden, the Immigration Judge shall weigh the credible testimony along with other evidence of record. Where the Immigration Judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence. Id subsection(b).

In these proceedings, the respondent submitted form I-485 application, which begins on page 4 of Exhibit 6. That application is six pages long. On the sixth page, the respondent's /applicant's statement is contained in part five. After the Court placed the respondent under oath in these proceedings, the Court directed the respondent to his I-485 application and went over the part 5 of that application with the respondent. The respondent testified under oath that he can read and understand English, that he has read and understood each and every question and instruction on this I-485 form, as well as his answer to each question on this form. The Court swore the respondent again to this application. The respondent certified under penalty of perjury under the laws of the United States of America that the information provided in this application is all true and correct.

At that point, the Department of Homeland Security indicated that they had conducted background checks related to the respondent's application set forth in Exhibit 7 and determined that the respondent had been encountered by the New York State police in Somers, New York, on or about March 8, 2009. Page 2 of Exhibit 7 indicates that the respondent was arrested by the state police with a charge tracking number of

32020144J for driving while intoxicated. First offense, driving while ability impaired by the consumption of alcohol two counts. The respondent was questioned under oath by both his counsel and the Government regarding his answer in the form I-485 in part 3, which is page 3 of the I-485 application. That question states as follows. Answer the following questions (if your answer is yes to any question, explain on a separate piece of paper. Continuation pages must be submitted according to the guidelines provided on page 2 of the instructions under what are the general filing instructions?" Information about documentation that must be included with your application is also provided in this section.) Answering yes does not necessarily mean that you are not entitled to adjust status or register for permanent residence.) That section then goes on to say, have you ever in or outside the United States (a) knowingly committed any crime of moral turpitude or drug offense for which you have not been arrested. The respondent answers "no" to that. Second, under (b) ...been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance excluding traffic violations and the respondent answers "no."

During the respondent's testimony, he did admit that he was encountered by the New York state police after pulling to the side of the road with a flat tire. The respondent testified that he slid sideways after his tire blew up, that no one else was in his vehicle, that no one else was hurt, there were no other vehicles involved in the accident. The respondent believes the police arrived because another vehicle stopped to call the police. The respondent testified that he was given a field sobriety test and a breathalyzer at the scene by the state trooper. The respondent indicates that the state trooper told him that the breathalyzer that was utilized at the scene was not working properly and that the state trooper needed to take him back to the barracks to use a second breathalyzer machine. The respondent testified he was placed in handcuffs,

taken back to the barracks, given another breathalyzer test. The respondent indicates that he was told the reading, although the respondent has been unclear exactly what that reading was, he said at one point the reading was 7.7, which is not a breathalyzer reading. The reading would begin with a point and then numbers following that. In any case, the respondent testified that he was not kept at the state police barracks overnight but that he was released and that he then appeared two or three times in court after that.

The respondent has also testified that he went to court in New Jersey after receiving a ticket after taking a wrong turn and that is his only remaining criminal record. Both the Government and the respondent's counsel have argued to this Court that the issue before the Court is one of discretion. That is, that the Court should balance the positive and the negative factors in this case to determine whether the respondent is deserving, that is whether he merits the exercise of this Court's discretion. Although this Court agrees that that is one of the respondent's burdens in this case, the respondent's first burden is that he satisfies the applicable eligibility requirements. As this Court set forth above, the REAL ID Act of 2005, specifically Section 101(d)(2) of title 1 of the REAL ID Act of 2005, added Section 240(c)(4) to the Immigration and Nationality Act. That section specifically provides that an alien applying for relief has the burden of proof to establish that he satisfies the applicable eligibility requirements first, and then with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

This Court does not find that the respondent reaches his burden of arguing that he merits a favorable exercise of discretion, as this Court finds that the respondent has not satisfied the applicable eligibility requirements for adjustment of status. This Court finds that one of those requirements is that the respondent submit an

I-485 application to the Court, that that application is submitted to the Court under the pains and penalties of perjury, and that that application be accurate and complete. This Court finds that the respondent's I-485 application is neither accurate, nor complete. And therefore, the Court does not find that the respondent has satisfied the applicable eligibility requirements as set forth in Section 240(c)(4)(A)(i) and therefore denies the respondent's adjustment of status application under the REAL ID Act of 2005 as he has not met his burden of proof.

The instructions within the I-485 itself indicate that if the respondent answers "yes" to any question in part 3(c)(1), that he is to explain that answer on a separate piece of paper. In question 1-B, the respondent is specifically asked whether he has ever been arrested, charged, cited, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance excluding a traffic violation. The respondent has answered "no" to this question. This Court finds that in answering "no" to this question, the respondent fails to meet his burden of proof under the REAL ID Act to satisfy the applicable eligibility requirements for adjustment of status. This Court finds after listening to the respondent's testimony, that the respondent was fully aware that he had been at least arrested or charged or fined for breaking or violating any law or ordinance excluding a traffic violation.

Specifically, the respondent testified that he was aware that he was encountered by the police in New York at the side of the road, that he was given a field sobriety test, that he was given a breathalyzer test at the side of the road, which according to the state trooper statement to the respondent, was faulty, the respondent was placed in handcuffs, taken to the state police barracks, given another breathalyzer test. Apparently at that point, the respondent was released and then returned to court on two or three occasions. The respondent testified that he was ultimately fined. The

Court finds that the respondent is and has been well aware that he was arrested and/or charged and/or fined for driving while intoxicated, first offense, that is driving under the influence of intoxicating liquors. This Court finds that the respondent answered no to this question after he read this question, understood this question, and understood he was answering no to it.

The respondent has signed this I-485 application on page 6. The Court has confirmed his signature. The respondent signed this on April 30, 2013, several years after his encounter with the state police in New York and several years after the disposition of his drunk driving offense as set forth in Exhibit 7. This Court again went over the fact that the respondent can read and understand English, that he has read and understood each and every question and instruction on this form as well as his answer to each question. The respondent again, under oath, in this court certified under penalty of perjury under the laws of the United States of America that the information provided in this application is true and correct. This application and the information provided in it is in fact not true and correct. In addition, the respondent, had he answered truthfully to the question had he been arrested, charged, or fined, for violating or breaking any law or ordinance in the United States or outside the United States, that he was to provide an explanation on a separate piece of paper. Because the respondent answered "no" to this, the respondent has not provided any separate explanation. The respondent has not provided police reports or docket sheets relating to this offense in New York.

Both the respondent and the Government incorrectly jumped to whether or not this Court should exercise its discretion in this case. That is not the current state of the law. The current state of the law under the REAL ID Act of 2005 is that the respondent bears the burden of proof first to establish that he establishes the applicable

eligibility requirements for adjustment of status. This Court finds that by submitting to this Court an I-485 application that has an answer on it that is false, that the respondent cannot satisfy the applicable eligibility requirements for adjustment of status and this Court finds that it need not delve further into whether or not the respondent can demonstrate his burden that he merits a favorable exercise of discretion.

Had the respondent argued that he made a mistake in his 485 application, that is that he did not know that he had ever been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law, that may be a different matter. But in this case, the respondent has not argued that. His counsel has argued that his counsel did not know of this offense in New York. But the respondent has never argued that or testified to that. The respondent testified immediately that he remembered this offense in New York. He testified immediately that he was placed in handcuffs. He testified that he was given a field sobriety test, a breathalyzer at the scene of his accident where he says he slid sideways, and a breathalyzer again at the state police barracks. Respondent has testified that he appeared in court on two or three occasions and was fined. There is no question in this Court's mind that the respondent knew that he should have answered yes to this question and simply did not. The respondent has not explained to this Court's satisfaction why he answered no to this question and because this Court swore the respondent under oath to the contents of this application and because his answer to that question is false, this Court cannot find that the respondent has met his burden of proof under the REAL ID Act of satisfying his applicable eligibility requirements. That is the completion of the form I-485 in a truthful manner.

The respondent falsely certified under penalty of perjury under the laws of the United States of America that the information that he provided in this I-485

application is all true and correct. This Court finds that the respondent has not made a mistake in this application. This Court finds that the respondent has falsely answered this question. Based upon the record, including respondent's testimony and Exhibit 7, and this Court finds that the respondent has not met his burden of proof under Section 240(c)(4)(A)(i) of the Act and therefore, this Court will deny the respondent's application for adjustment of status. As set forth above, this Court finds it unnecessary to reach whether or not the respondent can meet his burden of proof as to whether he merits a favorable exercise of the Court's discretion.

The respondent seeks no other form of relief in this case and therefore, the Court will enter the following order.

ORDERS

The respondent's application for adjustment of status under Section 245 of the Immigration and Nationality Act be and is hereby denied;

That the respondent be ordered removed from the United States to Ghana based upon the one charge of removability contained in the Notice to Appear at Exhibit 1.

Please see the next page for electronic

signature

MATTHEW J. D'ANGELO
Immigration Judge

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Immigration Judge MATTHEW J. D'ANGELO

dangelom on October 25, 2013 at 2:00 PM GMT

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