U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ESPINO III, VICENTE SOMERA **A 087-081-219**

Date of this notice: 8/5/2013

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:
Liebowitz, Ellen C

lulseges
Userteam: Docket

File: A087 081 219 – Honolulu, HI Date: AUG 05 2013

In re: VICENTE SOMERA ESPINO, III a.k.a. Vicente de la Cruz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James A. Stanton, Esquire

ON BEHALF OF DHS: Chandu Latey
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

Sec. 237(a)(3)(D), I&N Act [8 U.S.C. § 1227(a)(3)(D)] -
False claim of United States citizenship (not sustained)

APPLICATION: Adjustment of status

The respondent, a native and citizen of the Philippines, appeals the Immigration Judge's February 23, 2012, decision denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). We will dismiss the appeal.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent filed his application after May 11, 2005; therefore, the provisions of the REAL ID Act apply. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent concedes he checked the box on a Form I-9 indicating he is a citizen or national of the United States. He claims he did so at the direction of a Human Resources employee. He testified that he assumed he must be considered a national of the United States since he was instructed to check that box. A Record of Sworn Statement indicates the respondent admitted to an immigration officer that he claimed to be a United States citizen (Exh. 8).

The Immigration Judge did not credit the respondent's assertion that he informed the immigration officer that he checked the box because he was instructed to do so by a Human Resources employee, and that the immigration officer erred by not reflecting his explanation in the Record of Sworn Statement. The respondent initialed each statement in the Record of Sworn Statement and signed it, affirming its accuracy. He did so in the presence of his *United* States

citizen daughter and his lawyer, who both accompanied him to the interview with the immigration officer. The Immigration Judge relied on these factors when not crediting the respondent's assertion that the Record of Sworn Statement is inaccurate.

The Immigration Judge's adverse credibility finding is not clearly erroneous. The Immigration Judge is permitted to make reasonable inferences among the plausible possibilities in the record, and did so in this case. *See Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (drawing inferences from direct and circumstantial evidence is a routine and necessary task of any fact finder). The Immigration Judge reasonably found it implausible that the respondent would initial and sign the Record of Sworn Statement if it was inaccurate and that his lawyer would allow him to do so. The adverse credibility finding undermines the respondent's argument that the Record of Sworn Statement should not be evidence of his intent to claim citizenship, as opposed to nationality, at the time he filled out the Form I-9.

In light of the evidence of record and the respondent's lack of credibility, we agree with the Immigration Judge that the respondent did not meet his burden of establishing he is admissible, which is a requirement for adjustment of status. *See* section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii) (rendering inadmissible one who makes a false claim to United States citizenship).[1] Accordingly, we will dismiss the appeal. The respondent provided evidence that he posted the required voluntary departure bond; therefore, we will reinstate the grant of voluntary departure.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties

[1] The DHS did not appeal the Immigration Judge's holding that it did not meet its burden of proving removability under section 237(a)(3)(D) of the Act.

for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

Ellen Rubowitz
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HONOLULU, HAWAII

File: A087-081-219 February 23, 2012

In the Matter of

VICENTE SOMERA ESPINO III	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(1)(B) of the Immigration and Nationality Act; Section 237(a)(3)(D) of the Immigration and Nationality Act.

APPLICATIONS:

ON BEHALF OF RESPONDENT: JAMES A. STANTON

ON BEHALF OF DHS: CHANDANI LAYTEY

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 58-year-old, unmarried male, who is a native and citizen of the Philippines. The Department of Homeland Security issued a Notice to Appear to the respondent on June 7, 2010. This Notice to Appear was filed with the Immigration Court on June 17, 2010, vesting jurisdiction with the Immigration Court. Service of the Notice to Appear and

jurisdiction has not been contested in this matter. The Notice to Appear was marked as Exhibit 1.

At a master calendar hearing, the respondent admitted four factual allegations, denying the fifth factual allegation; the respondent conceded removability under Section 237(a)(1)(B) of the Immigration and Nationality Act, in that after admission as a non-immigrant under Section 101(a)(15) of the Act, the respondent had remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States. The Department of Homeland Security, in support of the two charges of removability, lodged five factual allegations. The Department alleges that the respondent is not a citizen or national of the United States, and is a native of the Philippines and a citizen of the Philippines; that the respondent was admitted to the United States at San Francisco, California, on or about July 2, 2003, as a non-immigrant H-1B, with authorization to remain in the United States for a temporary period not to exceed November 1, 2003; and that the respondent remained in the United States beyond November 1, 2003, without authorization from the Immigration and Naturalization Service or its successor, the Department of Homeland Security. The Notice to Appear further alleges that on or about January 2007, the respondent misrepresented himself to be a citizen of the United States for purposes of gaining employment, by submitting a Form I-9, Employment Eligibility

Verification, and attesting to be a citizen or national of the United States. The Court did not rule on removability under the Section 237(a)(3)(D) charge.

The Court took testimony from the respondent and his daughter, and considered the following evidence in the record. Exhibit 1, the Notice to Appear, dated June 7, 2010; Exhibit 2, the hearing notice of hearing on July 13, 2010; Exhibit 3, a decision on application for status as a permanent resident; Exhibit 4, a document entitled Motion to Reopen Removal Proceedings, Rescind In Absentia Order of Removal, Change Venue to the Office of Immigration Court in Honolulu, Hawaii, and Appear Telephonically; Exhibit 5, an order generated by the Court, motion to reopen; Exhibit 6, motion to reopen and change venue; Exhibit 7, a document entitled Respondent's First Hearing Exhibit; Exhibit 8, document entitled U.S. Department of Homeland Security Evidence, certificate of service of November 30, 2011; Exhibit 9, respondent's motion to dismiss charge 2 in respondent's June 7, 2010 Notice to Appear; Exhibit 10, Form I-693, Report of Medical Examination; Exhibit 11, Respondent's Second Hearing Exhibits; Exhibit 12, Respondent's Third Hearing Exhibits; Exhibit 13, an attachment to Form I-485; Exhibit 14, decision on application to register permanent residence.

STATEMENT OF THE LAW

Adjustment of status is available to an alien who (A) has been inspected and admitted or paroled into the United

States; (B) is eligible to receive an immigrant visa because he or she has an approved visa petition; (C) an immigrant visa is immediately available at the time the application is filed, because the petitioner's priority date, if applicable, is current; and, (D) is admissible to the United States for permanent residence. See Section 245(a) of the Act. As adjustment of status is a discretionary form of relief, the alien must also show he merits a favorable exercise of discretion. See Matter of Patel, 17 I&N Dec. 597 (BIA 1980).

The respondent's case comes to the attention of the Department of Homeland Security during an interview in which the respondent identifies that he filled out a Form I-9 where he checked the first box of the Form I-9. The respondent is attending an interview with an adjudications officer. The respondent attends this interview with his daughter and an attorney. As the testimony reflects, the respondent was engaged in a communication with the adjudications officer, where the respondent recounts checking the box 1 of the Form I-9, which indicates that the person would be a citizen or national of the United States. The respondent testifies that as he was directed to sign or check that box, he thought that he may be a national of the United States. And the respondent testifies that he never intended to claim to be a United States citizen. The respondent also testifies that he was unaware that it would be illegal to claim to be a United States citizen. The respondent,

who speaks English, was educated in English in high school, and also through most of college, as the respondent has indicated that he almost obtained a degree in college, but stopped short a few units. The respondent testified today in English. The Court has no reason to believe that the respondent does not have a thorough understanding and appreciation of English.

The respondent was first employed in the United States in 1986. The respondent has testified that he had supervisor responsibility over six employees. The respondent has had at least three jobs in the United States that the Court is aware of. The respondent is confronted with a sworn statement that was produced after an interview with an adjudications officer, in which the respondent initials and dates each line contained in the sworn statement. The respondent testifies that he knew the information was wrong, but signed it and initialed and dated the document because the person that asked him to do that was in a position of authority. The respondent signed, initialed, and dated this document, with his daughter being present, who works at the U.S. Postal Service, with an attorney being present, and no one raised any issues relating to the information contained in the sworn statement varying from the information that the respondent provided during the course of the interview.

The Court considered the respondent's argument, as the respondent cites memos within the Department of Homeland Security or Immigration and Naturalization Service, relating to

sworn statements, and also Form I-9's. The Court did not find, based upon the evidence that was presented, that the respondent was removable as charged under 237(a)(3)(D), or that allegation 5 was factually accurate. As such, the Court did not sustain allegation 5 or the corresponding charge.

The Court took testimony, as is consistent with the application for adjustment of status. The Court had the opportunity to observe the respondent. The Court would find that the respondent did not testify credibly today. The respondent articulates that he thought he was a U.S. national or that he could be a U.S. national, simply because someone informed him to check the box, that the respondent testifies that he did so because that person was in a position of authority and he was an applicant for a job, and that he wanted that job. The Court would find that the respondent did check that box to receive a benefit of employment. What was unclear, and the reason why the Court did not sustain the allegation and charge, was whether or not the respondent was making a false claim as a United States citizen, or whether or not he was claiming to be a national. In the event that the respondent was claiming to be a national, the respondent would be eligible for the relief sought. However, with the respondent's testimony relating to his representations to the adjudicating officer, it is clear the respondent provided testimony relating to a U.S. citizen issue, and not a U.S. national issue. The Court draws

this conclusion because the respondent attends his interview with his daughter and with an attorney, all of which had the opportunity to review, evaluate, comment, report adversely, if the adjudicating officer had performed or committed what would ultimately be fraud in their misrepresentation in memorializing the information that the respondent had testified to during the interview. The respondent has not filed a complaint against the adjudicating officer. The respondent's daughter, who is a U.S. Postal Service employee, who acknowledges the understanding of the ability to file complaints against federal government employees, and the respondent's attorney, who was present during the interview, and also present during the signing of the sworn statement, which, according to the respondent, is materially different from that which he made representations to in this interview. The Court has not been provided with any documentation relating to any complaints filed with the adjudications officer or the attorney that was appearing with the respondent. This case is recent in the grand scheme of things. The respondent's application was denied on May 4, 2009. It is quite possible, and maybe even probable (although the record does not reflect), that the adjudicating officer is still with USCIS. However, based upon the information that has been presented, the Court would find that the respondent has failed to establish that he did not present a false claim to obtain employment at Cadbury Schweppes.

The Court, as such, would turn to whether or not the respondent's application should be granted. The Court would find that, as a matter of law, it should be denied. The Court would turn to whether or not the respondent be granted adjustment of status as a matter of discretion. The Court, in evaluating the positive and the negative factors in the respondent's case, respondent not having any criminal record, the respondent paying taxes. The Court would also evaluate and consider the fact that the respondent has a United States citizen daughter and six children in the United States. The Court would find, based upon the respondent's testimony and representations, or more specifically, misrepresentations, in these proceedings today, that the respondent should be denied adjustment of status, as a matter of discretion.

The Court turns to whether or not the respondent should be granted voluntary departure. The Court would find that there are no statutory bars eliminating the respondent from eligibility for voluntary departure. The respondent has been in the United States for a period of time, and does have children in the United States. The Court would grant the respondent's request for voluntary departure over the Department of Homeland Security's objection, requiring that the respondent post a $500 voluntary departure bond within five business days, and requiring that the respondent depart the United States within 30 days of today's hearing. The departure date being March 26,

2012.

ORDER

IT IS THEREFORE ORDERED that the respondent's application for adjustment of status be denied; that the respondent's request for voluntary departure be granted.

CLARENCE M. WAGNER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE CLARENCE M. WAGNER, in the matter of:

VICENTE SOMERA ESPINO III

A087-081-219

HONOLULU, HAWAII

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Ashley Gaither

ASHLEY GAITHER (Transcriber)

DEPOSITION SERVICES, Inc.

MARCH 30, 2012

(Completion Date)