U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

San Giorgio, Dolores Xiomara
Dolores X. San Giorgio, PA
10211 W. Sample Rd., Suite 111
Coral Springs, FL 33065

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: B[redacted], G[redacted] J[redacted]

A [redacted]-285

Date of this notice: 2/1/2019

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:
Wendtland, Linda S.
Greer, Anne J.
Donovan, Teresa L.

GilbeauR
Userteam: Docket

File: A[redacted]-285 – Miami, FL

Date: FEB - 1 2019

In re: G[redacted] J[redacted] B[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dolores Xiomara San Giorgio, Esquire

ON BEHALF OF DHS: Janelle C. Cruz
Assistant Chief Counsel

APPLICATION: Waiver of deportability under section 237(a)(1)(H) of the Act; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Haiti, has appealed from the decision of the Immigration Judge dated October 18, 2017. In that decision, the Immigration Judge, first, determined that the respondent is ineligible for a waiver of deportability under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H) (IJ at 6-7, 11, 15-16).

The respondent entered into a fraudulent marriage and thereby obtained admission to the United States as an immigrant and lawful permanent residence. The Immigration Judge determined that, while the waiver could cure the respondent's inadmissibility at the time of his admission, section 237(a)(1)(H) of the Act cannot cure his inadmissibility resulting from his fraudulent I-751, Petition to Remove Conditions on Residence ("I-751") and his subsequent N-400, Application for Naturalization ("N-400"), both of which were submitted after the respondent's admission as an immigrant.

Next, the Immigration Judge made a mixed credibility finding (IJ at 10, 12, 17). While the Immigration Judge found the respondent "for the most part credible[,]" she specifically disbelieved his testimony that he continued to reside with his first wife until he married his second wife on June 27, 2016 (IJ at 10, 12; Tr. at 64, 61). Finally, the Immigration Judge denied the respondent's applications for asylum under section 208 of the Act, 8 U.S.C. § 1158, withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and withholding of removal under the Convention Against Torture (IJ at 12-14, 17). *See* 8 C.F.R. § 1208.16(c).

For the following reasons, the respondent's appeal from the denial of his I-589, Application for Asylum and for Withholding of Removal ("I-589") will be dismissed (Exh. 5). However, his appeal from the denial of his application for a waiver of deportability under section 237(a)(1)(H) of the Act will be sustained. Accordingly, the record will be remanded for further proceedings and the entry of a new decision.

We review the Immigration Judge's findings of fact under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other

issues, including issues of law, judgment, or discretion, under a *de novo* standard.[1] *See* 8 C.F.R. § 1003.1(d)(3)(ii).

There are two issues presented on appeal. The first is whether the Immigration Judge correctly found that the respondent has established neither a well-founded fear of "persecution" nor a clear probability of "torture," and thus, properly denied the respondent's I-589. *Compare* 8 C.F.R. § 1208.13(b) *and Matter of Mogharrabi*, 19 I&N Dec. 439, 442-43 (BIA 1987), *with* 8 C.F.R. § 1208.16(c)(2) *and Matter of J-E-*, 23 I&N Dec. 291, 302-03 (BIA 2002); *see also Perlera-Escobar v. Exec. Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990) (per curiam). In regard to the denial of the respondent's I-589, we affirm the Immigration Judge's October 18, 2017, decision (IJ at 3, 5-6, 12-14, 17). *See* 8 C.F.R. § 1003.1(e)(5).

On appeal, the respondent concedes that he has not been persecuted in Haiti in the past (Respondent's Br. at 24; IJ at 5; Tr. at 89, 92). The respondent has indicated that, because his parents and brother have been mistreated because of his brother's political opinion "for years[,]" he fears that the individuals who have mistreated his family members will "impute upon him the same political opinion of his family" (Respondent's Br. at 24, 25; Tr. at 86, 89-95).

However, the Immigration Judge's factual finding that the respondent has shown neither a reasonable possibility of persecution nor a clear probability of torture in Haiti is not clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017); *see also Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1308 (11th Cir. 2013); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). As reflected in the Immigration Judge's decision, the political party that the respondent's family supports holds political power in Haiti (IJ at 6; Tr. at 91).[2] We agree that the respondent has not shown a well-founded fear of countrywide persecution in Haiti. *See Matter of C-A-L-*, 21 I&N Dec. 754, 757 (BIA 1997); *Matter of R-*, 20 I&N Dec. 621, 625 (BIA 1992).

The second issue presented on appeal is whether the respondent is eligible for the section 237(a)(1)(H) waiver of deportability. By entering into a fraudulent marriage for the purpose of circumventing the immigration laws, the respondent gained admission to the United States as a conditional lawful permanent resident on February 13, 2011, and the removal of the conditions on his lawful permanent residence on March 19, 2014 (IJ at 2; Tr. at 13-14, 51; Exhs. 1, 13). He entered into the fraudulent marriage on March 29, 2010, in Haiti (Exhs. 1, 3 at p. 8).

---

[1] The adverse portion of the credibility finding only pertains to the respondent's application for a waiver of deportability, not his applications for asylum and withholding of removal. Because we have determined, without regard to his testimony, that the respondent is eligible for the waiver of deportability as a matter of law, we need not address the respondent's credibility in order to resolve the appeal.

[2] We take administrative notice that Jovenel Moïse of the Tèt Kale Party remains the president of Haiti. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *see also Matter of R-R-*, 20 I&N Dec. 547, 551 n.3 (BIA 1992) ("[T]his Board may properly take administrative notice of changes in foreign governments." (citations omitted)).

The respondent's marriage fraud went undetected until he submitted his N-400 on February 26, 2015 (IJ at 6-7, 16; Tr. at 66-67; Exh. 3). During the May 14, 2015, interview on the N-400, the immigration officer determined that the respondent's marriage may be fraudulent (IJ at 6-7). As a result, the Notice to Appear was served upon the respondent on June 15, 2015, and the removal proceedings were initiated on September 17, 2015 (IJ at 6-7; Exhs. 1, 3). Following the initiation of the removal proceedings, the fraudulent marriage was legally terminated on June 8, 2016, and the respondent married the mother of his two United States citizen children on June 27, 2016 (IJ at 3-4; Exh. 4 at p. 5).

As recognized by the Immigration Judge, the respondent is eligible to waive his inadmissibility arising under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), at the time of his admission on February 13, 2011, pursuant to section 237(a)(1)(H) of the Act (IJ at 15). The respondent has conceded that he is deportable as charged based on the marriage fraud at the time of his admission (IJ at 15).

However, the Immigration Judge further determined that, because the respondent also utilized the fraudulent marriage to remove the conditions on his lawful permanent residence on March 19, 2014, and to apply for naturalization on February 26, 2015, he must also (but could not) establish eligibility for the waiver of deportability in relation to those subsequent fraudulent applications (IJ at 11, 15-16). In addition, the Immigration Judge determined that the respondent's fraudulent income tax returns, in which he claimed joint filing status on the basis of the fraudulent marriage, also render him ineligible for the waiver of deportability (IJ at 16).

Thus, the Immigration Judge determined that, due to the continuation of the marriage fraud after the respondent's admission, he was not "otherwise admissible to the United States" on February 13, 2011, for the purpose of establishing his eligibility for the 237(a)(1)(H) waiver (IJ at 8, 15). However, this determination constitutes a reversible error of law and will be set aside.

The Immigration Judge reasoned that, because section 237(a)(1)(H) of the Act is only available to waive inadmissibility arising under section 212(a)(6)(C)(i) of the Act at the time of entry or adjustment of status, the waiver is unavailable to waive the fraud committed in conjunction with the respondent's I-751, N-400, and federal income tax returns. *See generally Matter of Agour*, 26 I&N Dec. 566 (BIA 2015). But this analysis overlooks that in order to obtain a section 237(a)(1)(H) waiver of the fraud committed at the time of entry or adjustment of status, the respondent need only show that he was otherwise admissible at the time of those events. There is no requirement of continuing admissibility up to the present time, and thus no need for a waiver with regard to any continuing, post-entry-or-adjustment fraud that has not been charged against the respondent. At the time of his entry or adjustment of status, the respondent was only inadmissible under section 212(a)(6)(C)(i) of the Act for his marriage fraud committed in conjunction with his admission on February 13, 2011, and at the time he submitted the I-751 on March 19, 2014. A waiver under section 237(a)(1)(H) is available for both of those instances of fraud. *See Hussam F. v. Sessions*, 897 F.3d 707, 726 (6th Cir. 2018); *Acquaah v. Sessions*, 874 F.3d 1010, 1018 & n.20 (7th Cir. 2017); *Vasquez v. Holder*, 602 F.3d 1003, 1015 (9th Cir. 2010).

Otherwise qualifying acts of fraud or willful misrepresentations that do not trigger inadmissibility under section 212(a)(6)(C)(i) of the Act at the time of entry of adjustment of status do not require a waiver of deportability under section 237(a)(1)(H) of the Act. Conversely, the unavailability of a section 237(a)(1)(H) waiver for post-entry-or-adjustment fraud is immaterial when there has been no charge relating to such fraud that would require any kind of waiver in the first place. In other words, unless the Department of Homeland Security ("DHS") has charged the respondent with deportability under section 237(a)(1)(A) of the Act on the basis of inadmissibility arising from fraud at the time of his entry or adjustment of status, the respondent does not need to apply for a section 237(a)(1)(H) waiver, and absent an actual charge relating to fraud committed after his entry or adjustment, he does not need any other kind of waiver either.

Correspondingly, the respondent's marriage fraud committed *after* his February 13, 2011, admission and the subsequent removal of the conditions on his residence does not retroactively render him otherwise *inadmissible* to the United States as of those dates, and therefore, ineligible for the section 237(a)(1)(H) waiver. In short, only acts of fraud or willful misrepresentations that provide the factual basis for a charge of deportability under section 237(a)(1)(A) of the Act require a section 237(a)(1)(H) waiver. In this case, the respondent's fraudulent N-400 (like any fraud in his income tax returns) has not rendered him inadmissible at the time of his admission on February 13, 2011, or at the time of the removal of the conditions on his residence. Hence, apart from his marriage fraud, the respondent was "otherwise admissible to the United States" on the dates of his entry and adjustment. Therefore, he is eligible for the section 237(a)(1)(H) waiver.

In summation, the fraudulent N-400 has not rendered the respondent deportable under section 237(a)(1)(A) of the Act; nor has it given rise to any other deportability charge. As a result, the N-400 has not rendered the respondent ineligible for (or unable to benefit from) the section 237(a)(1)(H) waiver. Accordingly, we will remand the record for the Immigration Judge to determine whether the respondent merits a favorable exercise of discretion.[3]

The following orders will be entered.

---

[3] While the respondent's ongoing marriage fraud after admission has not rendered him ineligible for the section 237(a)(1)(H) waiver, the marriage fraud remains relevant to his discretionary fitness for relief and should be given the appropriate weight on remand. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30-31 (1996); *Matter of Tijam*, 22 I&N Dec. 408, 412 (BIA 1998); *cf. Matter of Sesay*, 25 I&N Dec. 431, 444 (BIA 2011) ("Issues about the validity of the qualifying marriage are also relevant to the exercise of discretion, and the fact of the divorce and its timing may raise questions about the bona fides of that marriage."); *Matter of Sweed*, 10 I&N Dec. 688 (BIA 1964) ("Approval of a visa petition to accord respondent nonquota [immediate relative] status on the basis of his marriage to a United States citizen does not preclude denial of respondent's application for adjustment of status under section 245, Immigration and Nationality Act, as amended, in deportation proceedings, in the exercise of discretion, based on doubt as to the bona fides of that marriage."). In previous cases involving the exercise of discretion, a fraudulent N-400 has been treated as an adverse discretionary factor. *See Matter of Tijam*, 22 I&N Dec. at 413 ("Making false statements under oath during the naturalization process is an extremely serious adverse factor."); *cf. Wang v. Holder*, 569 F.3d 531, 538 n. 5 (5th Cir. 2009).

ORDER: The respondent's appeal is dismissed in part and sustained in part.

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

FOR THE BOARD