U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: K[redacted], R[redacted]

A [redacted]-282

Date of this notice: 11/19/2018

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.
Crossett, John P.
Donovan, Teresa L.

GilbeauR
Userteam: Docket

File: A[redacted]-282 - Dallas, TX

Date: NOV 19 2018

In re: R[redacted] K[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Roy Kevin Petty, Esquire

APPLICATION: Adjustment of status; waiver of inadmissibility under section 212(i) of the Act

The respondent appeals from the Immigration Judge's July 18, 2017, decision, ordering her removal from the United States. The record will be remanded to the Immigration Judge for further proceedings in accordance with this opinion and for the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Indonesia who was initially admitted to the United States on May 16, 2002, as a non-immigrant visitor (IJ at 4; Respondent's Br. at 3). The respondent testified that upon the advice of co-workers, she contacted an immigration consultant as to whether she could help her "get a green card" (Tr. at 151-52; Respondent's Br. at 3). The respondent went to see this immigration consultant in March or April 2003, and after relating her experiences in Indonesia, she was told that her story needed to be embellished if she wanted to get "legal status" (Tr. at 154-56). The respondent testified that she signed a contract, written in Indonesian, to be represented by this person (Tr. at 156-57). When the respondent's attorney questioned her about the asylum application she was supposed to have filed, the respondent stated that the immigration consultant never sent her a copy of the asylum application (Form I-589) before it was filed, denied that the signature in Part D was made by her, and pointed to the signature in Part F of the asylum application as made by her at the asylum interview (Tr. at 158-62; Exh. 22). She testified that the immigration consultant only sent her a copy of the story that had been created for her to memorize to tell the asylum officer at her asylum interview, and assured her that an attorney and an interpreter retained by the immigration consultant would be there to help her (Tr. at 164-66).

The respondent stated that the attorney (who she met for the first time at the interview) only spoke in English, whereas she did not speak or read in English, and the interpreter, who spoke Indonesian, assured her that she would help her if she forgot any aspect of the story she was to memorize (Tr. at 168-69). The respondent testified that the asylum officer conducted the asylum interview in English, and while she understood what the interpreter was saying to her in Indonesian, she did not know whether the interpreter had accurately interpreted what she was saying or what was being said to her by the asylum officer (Tr. at 169-70, 229). The asylum officer used the interpreter provided by the immigration consultant, and the respondent related to the asylum

officer the story she was told to memorize (Tr. at 171-72, 222). The respondent claims that the interpreter told her that the interview was over and that she just needed to sign the form at the bottom, without ever explaining the importance or the significance of her doing so (Tr. at 173-74).

The record reflects the respondent was granted asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), on July 17, 2003. However, following the investigation and conviction of the immigration consultant, who had prepared and filed not only the respondent's fraudulent asylum application, but apparently many other fraudulent asylum applications, as well as the attorney who was fined and disbarred for being complicit in the fraud, the respondent's asylum status was terminated on January 13, 2010, and she was placed in these removal proceedings.

The respondent does not contest that she is removable as charged and the Immigration Judge's removability determination is affirmed. Although the respondent sought adjustment of status under section 245 of the Act, 8 U.S.C. § 1255, and a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), the Immigration Judge determined she was ineligible for those forms of relief on the ground that she had "knowingly made a frivolous application for asylum" after receiving notice of the consequences of doing so (IJ at 17-20, 20-23; Tr. at 17; Respondent's Br. at 1-2). *See* Section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6). The Immigration Judge's decision is supported by an adverse credibility finding based, essentially, on the respondent's admission that the asylum application that had been submitted on her behalf included material key elements that had been fabricated (IJ at 17-20, 20-23). *See* 8 C.F.R. § 1003.1(d)(3)(i).

This case presents mixed questions of law and fact. The Immigration Judge's credibility assessment is reviewed for clear error. *See id.* Whether the Immigration Judge properly applied the statutory framework to determine the respondent is subject to the penalties triggered by the filing of a frivolous asylum application is a question we review de novo. Section 208(d)(6) of the Act provides that an alien who files a frivolous asylum application is "permanently ineligible for any benefits" under the Immigration and Nationality Act, with the exception of withholding of removal. *See* 8 C.F.R. § 1208.20 (an asylum application is "frivolous" within the meaning of section 208(d)(6) if "any of its material elements is deliberately fabricated"). Because such serious consequences flow from an Immigration Judge's frivolousness finding, this Board will affirm such a finding only if: (1) the asylum applicant received notice of the consequences of filing a frivolous application; (2) the Immigration Judge made a specific factual finding that the alien knowingly filed a frivolous asylum application; (3) a preponderance of the evidence supports the Immigration Judge's finding in that regard; and (4) the alien was given a sufficient opportunity to explain and account for any discrepancies or implausible aspects of the claim. *See Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007); *see also Matter of B-Y-*, 25 I&N Dec. 236, 238 (BIA 2010). The analytical framework set forth in *Matter of Y-L-* and further clarified in *Matter of B-Y-* provides a four-step test for deciding whether an applicant for asylum has knowingly made a frivolous application for asylum.

The Immigration Judge's factual finding based on the respondent's concession that she had filed a materially false asylum application is not clearly erroneous (IJ at 16; Respondent's Br. at 1; Tr. at 236). However, while it is undisputed that a frivolous asylum application was filed on behalf of the respondent—which she now admits included material key elements that had been fabricated by the immigration consultant that prepared the asylum application—she argues that

she did not receive adequate notice as required under section 208(d)(4)(A) of the Act, 8 U.S.C. § 1158(d)(4)(A), warning her of the consequences as to such filings. The frivolous filing bar does not apply if the asylum applicant has not "received the notice under paragraph (4)(A)." Section 208(d)(6) of the Act. In turn, that paragraph states that "[a]t the time of filing an application for asylum, the Attorney General shall . . . advise the alien . . . of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum . . . ." Section 208(d)(4)(A) of the Act. *See Niang v. Holder*, 762 F.3d 251, 253 (2d Cir. 2014); *see also Matter of Y-L-*, 24 I&N Dec. at 155 (noting that applicants are entitled to various "procedural safeguards" prior to having a finding of frivolousness entered against them).

The Act requires only that the asylum applicant "receive [ ]" notice at the time of filing." *See Niang v. Holder*, 762 F.3d at 253. "[T]he warning on the asylum application form itself . . . is the only means under the current regulatory scheme by which notice may be given at the time of filing, regardless of the manner of filing." *Id.* at 254. Furthermore, "[t]his reading aligns with the [Board's] holding that 'the only action required to trigger the frivolousness inquiry is the filing of an asylum application.'" *Id.* (citing *Matter of X-M-C-*, 25 I&N Dec. 322, 324 (BIA 2010)).

The respondent recognized the document shown to her by her attorney at the hearing—which was identified as her asylum application—and confirmed that she signed it, pointing to Part F, at the end of the asylum interview (Tr. at 161-62). However, even though the asylum application contained numerous material falsehoods, the respondent contends that she never saw the actual asylum application before it was filed by the immigration consultant with the United States Citizenship and Immigration Services ("USCIS") (Respondent's Br. at 4). Even though it included a signature at Part D, she insists that it is not her signature and must have been forged by the immigration consultant (Respondent's Br. at 4). The respondent contends that it has not been shown that she had received the appropriate warnings "at the time of filing" in order to trigger the disqualifying provisions in section 208(d)(6) of the Act. *See Niang v. Holder*, 762 F.3d at 253.

The Immigration Judge acknowledged the record showed multiple signature styles for the respondent (IJ at 13-14). Nevertheless, he concluded that "given respondent's questionable testimony and variance in signature styles, she likely signed the application in Part D despite her contrary testimony" (IJ at 14). The Immigration Judge's conclusions are speculative. Moreover, the Immigration Judge does not explain why he would show deference to an immigration consultant (who was convicted of perpetrating multiple cases of asylum fraud) and an immigration attorney (who was disbarred and held complicit in that fraud) despite the respondent's explanations which take their fraudulent conduct into account (IJ at 14). The Board held in *Matter of Y-L-*, "[u]nder the regulation, plausible explanations offered by the respondent must be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding." *Id.* at 257.

The respondent testified that at the time of her asylum interview, she did not read the document and did not know enough English to understand what it said, and had no idea what she was signing because the interpreter did not translate the contents of the document to her—and yet, the Immigration Judge did not credit her explanation because the interpreter was under oath to interpret accurately and correctly (IJ at 14). As stated by the Immigration Judge, there is a presumption of regularity as it applies to the official acts of government officials, such that it is presumed the asylum officer properly delivered the oath to the interpreter and the respondent at the asylum

interview (IJ at 13; Exh, 17). The respondent, however, does not contend the asylum officer did not properly perform his duties, but rather that the interpreter did not accurately and fully interpret the oath as stated by the asylum officer and just told the respondent that she needed to sign the form (Respondent's Br. at 8). Even though the respondent testified that the interpreter worked for the immigration consultant, the Immigration Judge stated instead that the record showed that the interpreter was the respondent's friend (IJ at 14-15; Exh. 17). The Immigration Judge's conclusion is supported only by a checked box on a record of the asylum interview that the respondent contends was not fully translated to her, and is clearly erroneous. Furthermore, to the extent (if any) that the Immigration Judge intended to require the respondent to corroborate her assertion that she was never given the warnings as to the consequences of submitting a frivolous asylum application by obtaining corroborating statements from the immigration preparer, the attorney, and/or the interpreter, any such requirement was unreasonable since admissions in any corroborating statements could subject the authors to further criminal liability (IJ at 15). While we are precluded from making our own independent factual determination, we review de novo the weight to be given to the evidence.

Significantly, the Immigration Judge improperly placed the burden on the respondent to prove that she is not ineligible under section 208(d)(6) of the Act. To the contrary, it is the government under *Matter of Y-L-* that has the burden of establishing the respondent's ineligibility under section 208(d)(6) of the Act. *See id.* at 157-58.

Further, if the asylum applicant can demonstrate that the receipt of the advisals of the consequences of filing a frivolous application was thwarted by the intentional failure of the preparer or interpreter to provide them, then she cannot be said to have received the advisals. As argued by the respondent, the document preparer, the attorney, and the respondent's interpreter were not impartial but active participants in the fraud. They had an incentive not to inform the respondent of the advisals—they would have risked losing her business since she may not have agreed to proceed if she had known it involved the possibility of being forever barred from nearly all forms of relief from removal pursuant to section 208(d)(6) of the Act.

Even though the Immigration Judge's factual determination that the respondent's asylum application contained material elements that were fabricated is not clearly erroneous, this is insufficient to support the Immigration Judge's frivolous filing determination, as it also must be shown that the asylum applicant had notice of the consequences of filing such an application. On de novo review, we conclude that the Immigration Judge did not properly apply the statutory and regulatory framework to support his frivolous filing determination. Applying the various procedural safeguards prior to making a frivolousness finding, it does not appear that the Immigration Judge gave appropriate weight to the respondent's explanations as to not having received the requisite notice at the time of filing the asylum application with the USCIS as required under section 208(d)(4)(A) of the Act. *See Matter of Y-L-*, 24 I&N Dec. at 157-58. As the evidence in the record as to the adequacy of the requisite notice to the respondent of the consequences of filing a frivolous asylum application is ambiguous at best, it is insufficient to support a frivolousness finding.

As the respondent's removability is not at issue, the record will be remanded to the Immigration Judge to consider the respondent's eligibility for relief from removal, including her pending

applications for adjustment of status and a waiver of inadmissibility, and whether said relief is warranted in the exercise of discretion.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with this opinion and for the entry of a new decision.

Linda J. Wendtland
FOR THE BOARD