U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SAVADOGO, BAMBAYANDA KH... **A 206-031-211**

Date of this notice: 4/24/2019

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:
Donovan, Teresa L.

Userteam: Docket

File: A206-031-211 – New York, NY Date: APR 24 2019

In re: Bambayanda Khalil Issa SAVADOGO a.k.a. Robert Hegarty a.k.a. Khalil Savadogo

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anne W. Mathews, Esquire

ON BEHALF OF DHS: Sarah B. Campbell
Assistant Chief Counsel

APPLICATION: Adjustment of status

The Department of Homeland Security ("DHS") has appealed the Immigration Judge's September 13, 2017, decision, granting the respondent's application for adjustment of status filed under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his United States citizen wife. The DHS's appeal will be dismissed and the record will be remanded for required background and security investigations.

We review an Immigration Judge's findings of fact, including findings with regard to credibility and the likelihood of future events, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012) (holding that a determination of what will occur in the future and the degree of likelihood of the occurrence is a finding of fact subject only to clear error review); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Burkina-Faso. The respondent entered the United States in 2006 as a nonimmigrant visitor (IJ at 1). He married his United States citizen spouse in April 2014 and she filed a visa petition on his behalf in 2016 (IJ at 1-2; Exh. 7, Tab A). On September 13, 2017, the Immigration Judge granted the respondent's application for adjustment of status, which the DHS has appealed.

On appeal, the DHS contests the Immigration Judge's credibility determination. The Immigration Judge found that the respondent was credible regarding most of his testimony except his testimony concerning his November 2012 larceny arrest (IJ at 6-7). After evaluating whether the respondent's incredible testimony regarding this arrest rendered his other testimony incredible, the Immigration Judge determined that in all other regards his testimony was candid, responsive, and consistent (IJ at 7).[1]

[1] The Immigration Judge inadvertently referred to the respondent's arrest as the 2013 arrest on page 7 of his written decision, but it appears that he was referring to the 2012 arrest (IJ at 7).

The DHS argues on appeal that the Immigration Judge did not consider that the respondent engaged in dishonest conduct and provided false statements to law enforcement officers and immigration officers over the last 12 years (DHS's Br. at 8). However, the Immigration Judge's detailed decision discusses the respondent's conduct in the United States, including his arrests and convictions (IJ at 2-4, 6-7, 8-9). The DHS also asserts that the Immigration Judge did not address some inconsistencies between the respondent's testimony and documentary evidence (DHS's Br. 9-11). However, these purported discrepancies are not sufficient, considering the totality of the circumstances, to find clear error in the Immigration Judge's credibility determination. 8 C.F.R. § 1003.1(d)(3)(i).[2] Based on the foregoing, we conclude that the Immigration Judge did not clearly err in entering his credibility determination. *Id.*

The DHS also contends that the respondent is statutorily ineligible for adjustment of status based on alleged misrepresentations to the government on his nonimmigrant visa application and entry into the United States (DHS's Br. at 13-14). In particular, the DHS contends that the respondent "must have committed fraud in the application process [for a visitor's visa] and in his entry to the United States because he would not have been eligible for a temporary visitor's visa if he expressed his intention to reside permanently" (DHS's Br. at 13-14). The Immigration Judge did not specifically address this issue in his written decision. The respondent contends that the DHS waived this argument because the DHS did not adequately raise it before the Immigration Judge (Respondent's Br. at 12).

We agree with the respondent that the issue has been waived. Although the misrepresentation issue regarding the respondent's intent when coming to the United States and whether a waiver was needed were generally discussed, the DHS did not explicitly assert that the respondent was statutorily ineligible on this basis and that a waiver was needed (Tr. at 135-36, 139). Therefore, we will not further address the issue.

The DHS also contests the Immigration Judge's determination that the respondent merits adjustment of status as a matter of discretion (DHS's Br. at 15-21). Where an applicant for

[2] The DHS also argues that the Immigration Judge did not consider that the respondent did not produce reasonably available corroborating evidence, including the following: 1) evidence from his mother about his visa and travel to the United States; 2) evidence regarding his homelessness or that he stayed with a family friend upon his arrival to the United States; 3) a copy of charging documents for 2011 arrest or a complaint for the 2013 arrest; and 4) evidence to corroborate his employment history and that he ever filed taxes (DHS's Br. at 9, 11-12).

The lack of such evidence is not a proper basis to find the respondent incredible. *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C); *cf.* section 240(c)(4)(B) of the Act ("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"). The Immigration Judge found that the respondent's testimony was candid, responsive, and consistent and the respondent submitted a number of other documents to support his application for adjustment of status (IJ at 7). Furthermore, the Immigration Judge found that the testimony of the respondent's United States citizen wife was credible (IJ at 7).

adjustment of status under section 245 of the Act presents adverse discretionary information, it is necessary for him to offset this negative information with countervailing positive equities, including evidence of family ties in the United States, hardship if the application is not granted, and the length of the applicant's residence in the United States, among other things. *See Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). In the absence of adverse factors, adjustment of status will ordinarily be granted, although such a grant is also in the exercise of discretion. *See id.*

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the ground of inadmissibility, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *See Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at an early age), evidence of hardship to the respondent and his family if removal occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *See id.* at 584-85.

The DHS contends that the Immigration Judge placed undue weight on the respondent's marriage to his United States citizen wife and did not give sufficient weight to his criminal history (DHS's Br. at 15-16). The DHS claims that the respondent has extensive, disturbing, and escalating criminal history (DHS's Br. at 15).

While this is a close case, we agree with the Immigration Judge that the positive factors outweigh the negative factors in this case. We agree that the respondent's arrests are concerning. However, as noted by the Immigration Judge, the majority of the arrests were for low-level offenses, such as acting as a vendor without a license, jumping a subway turnstile, and simple possession of marijuana (IJ at 8). Furthermore, the Immigration Judge observed that all of the respondent's criminal cases, including those where the charges were more serious resulted in either dismissal or a disorderly conduct violation (IJ at 8-9). We also note that the respondent was convicted of trespass on February 2, 2010, in violation of section 140.05 of New York Penal Law based on a November 25, 2009, arrest (Exh. 7, Tab B).

The respondent has been married to his United States citizen wife since April 2014 and the Immigration Judge found that she testified credibly on his behalf (IJ at 7). The Immigration Judge recognized that the respondent and his wife married while he was incarcerated, but found that the record supported a finding that the marriage was bona fide (IJ at 8). The Immigration Judge also found that the respondent had a strong employment history and demonstrated that he had learned from his mistakes (IJ at 9). Based on the foregoing, we affirm the Immigration Judge's conclusion that the respondent merits adjustment of status as a matter of discretion.[3]

[3] We are not persuaded by the DHS's argument that the Immigration Judge should have required the respondent to produce additional evidence (DHS's Br. at 16-18). The Immigration Judge found

The DHS also argues that the respondent was arrested on June 26, 2018, for criminal sale of marijuana in the fourth degree (Respondent's Br. at 22). The respondent argues that this Board may not consider this new evidence on appeal (Respondent's Br. at 24-25).

In our appellate function, we are unable to consider this evidence because, with limited exceptions not pertinent here, we do not perform fact-finding on appeal. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984).

Therefore, we will construe the submission as evidence to be considered in a motion to remand. Motions to remand are subject to the same substantive requirements as motions to reopen. *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). The document the DHS seeks to submit was not available or could not have been discovered or presented at the hearing before the Immigration Judge. *See* 8 C.F.R. § 1003.2(c)(1). However, the document indicates that the charge related to the arrest was dismissed on July 25, 2018. Therefore, we conclude that remand is not warranted for consideration of this document.

Lastly, the DHS argues that the Immigration Judge prejudged the case (DHS's Br. at 21-22). The respondent contests this argument on appeal (Respondent's Br. at 23-24). The record indicates that the DHS was given an opportunity to question the respondent and his wife. Furthermore, the DHS was given an opportunity to discuss the relevant issues in the case at the end of the hearing (Tr. at 135-41). We are not persuaded by the DHS's arguments on appeal that the Immigration Judge prejudged the case.

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

Teresa L Dorer

FOR THE BOARD

most of the respondent's testimony credible, except for testimony regarding one of his arrests, and the respondent provided evidence to support his application for adjustment of status.