U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MARTIN,MICKAEL

A 076-549-309

Date of this notice: 12/27/2013

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:
Pauley, Roger

schwarzA
Userteam: Docket

File: A076 549 309 - New York, NY Date: DEC 27 2013

In re: MICKAEL CHRISTIAN MARTIN a.k.a. Michael Martin

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel W. Diaz, Esquire

ON BEHALF OF DHS: Carol Moore
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (sustained)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (sustained)

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: Termination

The respondent, a native and citizen of France, appeals the Immigration Judge's October 5, 2011, decision finding him removable and ordering him removed to France. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and (under the law of the Circuit with jurisdiction over this case) the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge did not clearly err in finding that in 1995 the respondent falsely claimed that he was a United States citizen in an effort to gain entry into the United States, and that he did not retract this false claim of citizenship until after immigration agents confronted him with information from computer records that indicated he was in fact a citizen of France (I.J. at 4-5, 8). Although the respondent concedes that he falsely claimed United States citizenship, he argues that the Department of Homeland Security (DHS) has not demonstrated by

clear and convincing evidence that his retraction of this false statement was not made "voluntarily and without delay" so as to negate the legal effect of the false statement (Exh. 6; Respondent's Br. at 4-5). *See Matter of Namio*, 14 I&N Dec. 412 (BIA 1973) (finding that a retraction made 1 year after an alien's initial false statement, when it appeared that disclosure of the falsity of the statements was imminent, was neither voluntary nor timely); *Matter of M-*, 9 I&N Dec. 118 (BIA 1960) (finding that a false statement was not "false testimony" as a matter of law because the alien made a "timely recantation" of his own volition and without delay); *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949).

On appeal, the respondent claims that the various documents submitted by the DHS in connection with the events of 1995 contain internal inconsistencies that undermine the DHS's claim that the respondent did not timely and voluntarily retract his false statements (Respondent's Br. at 4-5; Exh. 4). We disagree. Although a memorandum to file prepared by an officer named C. Racine states that the respondent "claimed that his father was a naturalized citizen of France," the two memoranda prepared by the officers who apparently conducted the respondent's secondary inspection, James Cairns and William Delamater, are in agreement that the respondent claimed that his father was a naturalized United States citizen, and Officer Delamater's memorandum indicates that the respondent claimed his father was also a French citizen (Exh. 4). While Officer Racine's memorandum is inconsistent with the memoranda prepared by Officers Cairns and Delamater, the Racine memorandum was dated 3 days after the respondent's primary and secondary inspections and appears in the nature of a summary of the entire encounter. Accordingly, this inconsistency does not significantly undermine the probative value of these documents. Similarly, although Officer Cairns's memorandum appears to bear an incorrect date, we find that this inconsistency does not undermine the contents of the memorandum, namely the assertion that the respondent did not retract his false claim of citizenship until after he was presented with evidence of its falsity (Exh. 4).

The respondent does not affirmatively dispute the DHS's assertion that he retracted his false citizenship claim only after being confronted with the DHS's evidence that he was not a United States citizen. Instead, the respondent submitted an affidavit which states the following: "At the border post, I initially told an officer that I was a United States citizen. Later, I told the officer that I was a citizen of France" (Exh. 6 at 4). Given the DHS's evidence concerning the encounter of August 5, 1995, and in the absence of an affirmative account by the respondent concerning the events which led up to his recantation of his false citizenship claim, we find no error in the Immigration Judge's conclusion that the respondent did not voluntarily and timely recant his false statement (I.J. at 8). Therefore, we agree with the Immigration Judge that the respondent is removable for having been inadmissible at the time of his adjustment of status under sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(7)(A)(i)(I). Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

New York, New York

File A 76 549 309 Date: October 5, 2011

In the Matter of

MICKAEL MARTIN	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(A) of the Immigration Act, an Alien who at the time of entry or adjustment of status was within one of the classes of Aliens inadmissible by the law existing at such time, Aliens who seek to procure, have sought to procure or have procured a visa, other documentation or admission into the United States or other benefit provided under the Act by fraud or by willfully misrepresenting a material fact under Section 212(a)(6)(C)(i) of the Immigration Act;
Section 237(a)(1)(A) of the Immigration Act, an Alien who at the time of entry or adjustment of status was within one or more of the classes of Aliens inadmissible under the law existing at that time, specifically immigrants not in possession of a valid immigrant visa or other document as a substitute therefore and not exempt from presenting such a document under Section 212(a)(7)(A)(i)(I) of the Immigration Act;
Section 237(a)(3)(D) of the Immigration Act, an Alien who has falsely represented himself to be a citizen of the United States for any purpose or benefit under this Act

APPLICATION: Termination

APPEARANCES:

ON BEHALF OF RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Daniel William Diaz, Esquire	Carol A. Moore, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent in this case was placed in removal proceedings through the Notice to Appear issued by the Department of Homeland Security, June 23, 2009. That document is Exhibit 1 in the record. It states the three charges referenced above.

The Court has considered the positions of the parties as to whether the Respondent is subject to removal as charged and has considered the statements of the attorneys, the documents that have been submitted as evidence, all of which have been admitted, and also the written statement of the Respondent, which was included in the record as Exhibit 6.

The Respondent in pleading to the Notice to Appear admitted allegations one, two, and three, and also admitted allegations seven and eight, but denied allegations four, five, and six. Allegations four, five, and six relate to an encounter of the Respondent with Immigration officers at the border between Canada and the United States in August, 1995.

I also note that DHS agreed in a discussion on the record, January 18, 2011, that the second charge stated above,

when it refers to the time of entry or of adjustment of status, relates to the Respondent's successful application for adjustment of status to lawful resident status, which was finalized in April, 2000.

The Department of Homeland Security has the burden of proof to establish that the Respondent is subject to removal, especially since the Department concedes in allegation three that the Respondent did adjust his status to lawful permanent resident through the legal process established by the Act and the regulations.

The specific issue is whether the Respondent misrepresented his legal status when he was questioned by Immigration officers as he sought to enter the United States from Canada in 1995.

Although the Court does not rely solely on the Respondent's statement, I do note that in Exhibit 6 the Respondent does say that he did initially tell the officer at the border he was a U.S. citizen. And he indicates that "later" he told the officer he was actually a citizen of France.

The record includes other documents. We have a decision denying naturalization to the Respondent issued by the Department of Homeland Security. This is Exhibit 3 in the record. This document summarizes material apparently contained in the DHS record, but the Court believes it isn't primary source information and is not necessary for the Court to rely on that document. It

is consistent with the other evidence, but I believe it's derivative of those documents.

The record includes a contemporaneous memo prepared August 8, 1995 by an Immigration officer, along the Canadian border. This is in the record as part of Exhibit 4. In that memo it indicates that when the Respondent was questioned at the border he originally stated that he was a citizen of the United States by birth. It indicates he was referred to secondary inspection which means a more formal, more deliberate questioning away from the immediate area where people are passing by the officer and answering a few questions, typically establishing their admissibility in a minute or less.

During secondary questioning the Respondent is reported by this memo to have stated again that he was born in the U.S., but had lived most of his life in France. It appears that this statement may have been the result of a question about what the Immigration officer's memo describes as a slight accent that the Respondent appeared to have, which might be a reason for the officer to be suspicious about the Respondent's claim to be a citizen of the U.S. by birth. The explanation given that the Respondent was born on U.S. soil, but later grew up in France would in fact certainly tend to explain why the Respondent might appear to have some accent that was not typical of people in the United States.

The memo then indicates that it was not until after the

Respondent was confronted as the memo states, with information derived from computer records about the Respondent's entry into the United States as a non-immigrant, that the Respondent did admit that he had not been born in the United States.

The case law concerning misrepresentation and fraud to obtain benefits under the Immigration Act does recognize the concept that a statement may be made which is false and which may involve the intent to misrepresent and obtain a benefit through fraud. Yet the person might so promptly retract the statement that it may not be considered as a basis for a finding of inadmissibility in the future, since the person corrected the impulsive statement within a very short time.

The Court does not believe that the process described in the memo in Exhibit 4 represents a prompt retraction of a statement made by an applicant knowing that statement was false, but who then corrected himself within a short time to straighten out the misimpression.

Instead, the memo in Exhibit 4 gives the picture of a person who hoped to pass through the border checkpoint by claiming U.S. citizen by birth. When questioned about it, showed a driver's license from the United States, gave a statement to explain why he appeared to have an accent that was arousing the curiosity of the officer at the border, and only when told that there was a record contradicting his story, then said in fact he was not born in the United States. I don't think this is a prompt

retraction. I think this is a gradual surrender to the evidence and the experience of the Immigration officers.

The record includes other documentary evidence, including a statement given by the Respondent on a printed form in reference to the proposed denial of his application for naturalization. In that statement, which is marked as Exhibit 4A, the Respondent says that the naturalization examiner who interviewed him originally was not even aware that there had been a problem for the Respondent at the Canadian border in 1995. It does appear this is plausible because the denial of naturalization also indicates that additional information came up after the interview was completed; and further, the Court notes that the records from 1995 are under a different Alien registration number than was used when the Respondent applied for adjustment of status, which would indicate that at that time the Immigration Service did not connect the 1995 incident with the application for adjustment.

One purpose of having biometrics fingerprint processing for Aliens at the present time is to try to identify any other records that may exist in any Immigration or Customs database, et cetera, that would furnish information relevant to the Alien in question. The Court tends to suppose that DHS would've come up with the information about the Respondent's problem on the Canadian border at some point before issuing the decision on his naturalization application. It's apparently not uncommon for

interviews to be conducted before all such processing of computer information is completed. The Court is not satisfied that DHS would not have realized that a problem existed from 1995 unless the Respondent had mentioned that to the Immigration officer. However, the Court believes that even if the Respondent's disclosure of such a problem to the naturalization officer was the sole source of the information leading to the denial of the naturalization application, still this does not mean that the Respondent did not make a false claim to U.S. citizenship at the time he was at the border in 1995.

The Respondent's application for adjustment of status, Exhibit 5, which was approved in the year 2000, does in the relevant question fail to disclose that the Respondent ever made a false statement or used fraud to gain a benefit under the Immigration law. The Respondent, at the time he completed that application, certainly should have been aware that he had in fact done so. The Respondent to some extent is suggesting that he'd really forgotten about the specific problems. He knew there was a problem at the Canadian border, but he forgot that it involved him claiming to be a U.S. citizen. This is not necessarily the most plausible explanation, but even if it is technically correct the Court believes that the Respondent still gave an incorrect answer concerning an incident he should have had in mind as he was applying for a green card, since at the Canadian border he had been refused entry to the United States. And the Court believes

that the evidence as a whole is more than sufficient to constitute clear and convincing evidence that the Respondent did use a false statement, a knowing false statement, to attempt to obtain a benefit under the Immigration Act when he was stopped along the Canadian border in 1995.

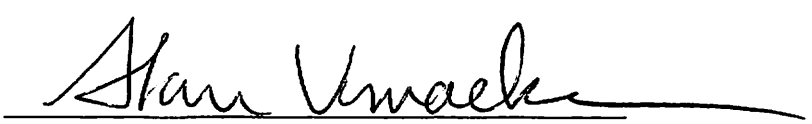
For this reason the Court believes that the Department of Homeland Security has established that the Respondent is subject to removal. First, the Court believes DHS has established the first charge because it seems clear to the Court that the Respondent did engage in conduct rendering him inadmissible under Section 212(a)(6)(C)(i) of the Immigration Act at the time of the encounter on the Canadian border, and therefore was inadmissible for that reason in the course of his application for adjustment of status.

The Court also believes that Respondent is removable under the second charge because he was inadmissible under the true facts under Section 212(a)(7)(A)(i)(I) at the time he was applying for adjustment of status.

The Court does not sustain the third charge because the Court believes that the statute in question, Section 237(a)(3)(D) of the Immigration Act, does not extend back in time to events that occurred in 1995, since the statute itself was enacted after that time and is not retroactive in effect in this regard. So the third charge is not sustained by the Court; the other two charges are sustained.

Since the Respondent is subject to removal he has the burden of proof to show his eligibility for any form of relief under the Immigration Act. The record includes discussion of whether the Respondent is eligible for certain types of relief. The Court did conclude that the Respondent appeared to be ineligible for any type of relief that would allow him to remain in the United States, at least any type of relief for which he had any basis to qualify. And the Court extended time to the Respondent to consider whether the Respondent wished to apply for voluntary departure in the alternative. The Respondent today, through counsel, has indicated he declines to do so.

Since there's no relief application before the Court, the Court believes the proper order is to order the Respondent's removal from the United States to France based on the first two charges in the Notice to Appear and not on the third charge as explained in this decision. And it is so ordered.



ALAN A. VOMACKA
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before ALAN A. VOMACKA, in the matter of:

MICKAEL MARTIN

A 76 549 309

New York, New York

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Linett Harleman, Transcriber

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December 1, 2011

Completion Date

lth/bjn