



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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333 Mt. Elliott St., Rm. 204
Detroit, MI 48207**

Name: OTAIFAH, SALEH MOHHAMED

A 055-775-988

Date of this notice: 1/26/2015

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:
Guendelsberger, John

Userteam: Docket

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5/17

Falls Church, Virginia 20530

File: A055 775 988 – Detroit, MI

Date:

JAN 26 2015

In re: SALEH MOHHAMED OTAIFAH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Rosario Shoudy
Assistant Chief Counsel

APPLICATION: Admission as a lawful permanent resident

The respondent, a native and citizen of Yemen, appeals from the Immigration Judge's decision dated January 18, 2013, finding that he abandoned his status as a lawful permanent resident of the United States. The record will be remanded.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Because the respondent's application for relief from removal was filed after May 11, 2005, it is subject to the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

We agree with the Immigration Judge that the respondent was competent in these proceedings. However, the Department of Homeland Security ("DHS") has not provided sufficient evidence establishing that the respondent abandoned his status as a lawful permanent resident. *See Matter of Huang*, 19 I&N Dec. 749 (BIA 1988) (holding that the DHS has the burden of establishing that an alien abandoned his lawful permanent resident status); *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975) (setting forth the relevant factors). The respondent departed the United States for Yemen on July 17, 2003, and he returned on December 10, 2010 (Exh. 1). According to the Immigration Judge, the respondent was incarcerated in Yemen from early 2004 through September 2007, and he abandoned his lawful permanent resident status because he waited more than 3 years to return to the United States (I.J. at 9-10). The Immigration Judge based his finding on the prison release form which is dated "09/07" in its heading (Exh. 3). However, the form also indicates in its body that the respondent was released in 2010. In addition, the respondent and his witness testified that the release occurred in 2010 (Tr. at 78-79, 96, 106, 126-132, 144). In light of the inconsistency, we find it appropriate to remand these proceedings for further inquiry regarding whether the respondent was legally free to leave Yemen in 2007 or 2010.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File: A055-775-988

January 18, 2013

In the Matter of

SALEH MOHHAMED OTAIFAH)	
)	IN REMOVAL PROCEEDINGS
RESPONDENT)	

CHARGE: Violation of Section 212(a)(7)(A)(i)(1).

APPLICATION: Review of whether respondent has abandoned his status.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: ROSARIO S. SHOUDY, Esquire

DECISION OF THE IMMIGRATION JUDGE

Respondent is a male, native and citizen of Yemen. The Department of Homeland Security initiated removal proceedings against the respondent pursuant to authority contained in Section 240 of the Immigration and Nationality Act. These proceedings were commenced with the Court by the filing of the Notice to Appear, which is dated December 11, 2010. At a hearing before the Court, the respondent admitted all but one of

the factual allegations, but denied that he had abandoned his resident status because of absence for a length of time exceeding one year. He therefore denied the single charge of removability, which is the issue before the Court today.

The evidence that the Court has considered in this matter includes the following. We have the Notice to Appear, which is dated December 11th, marked as Exhibit 1. Attached to that is an I-213, Record of Deportable/Inadmissible Alien, describing respondent's arrival at the airport in Atlanta. There is the Record of Sworn Statement in Administrative Proceedings, three pages, describing the interview. There is a withdrawal of Application for Admission/Consular Notification, a Notice to Detain, Remove, or Present Alien directed to Delta Airlines, some additional administrative records, and there is respondent's passport, identification page, his permanent resident card and his Michigan identification card, as well as his Customs Declaration and the I-94 paroling him into the United States for purpose of these proceedings. Finally, there are some additional documents, including respondent's fingerprints, and an FBI request for clearance.

Exhibit 2, presented by respondent at a hearing on August 24, 2011, was a translation of a judgment indicating that respondent had been acquitted from the first count of the indictment against him after verifying the accusation as false, and acquitted from the second count of the indictment for lack

of evidence and ordered that the prosecutor's office release all documentation belonging to the accused from proceedings in Yemen. Exhibit 3 was the release form with translation issued by the Director of the Central Prison indicating that following the orders of the Supreme Court president and the Supreme Committee, respondent had been acquitted from the charge of intentional murder. That was Exhibit 3.

Exhibit 4 was a medical statement indicating that respondent, in Yemen at the Al-Amal Psychiatric Hospital, had been treated for a diagnosis of schizophrenia. Exhibit 5, duplicates of the I-213 and the Record of Sworn Statement that were part of Exhibit 1. On the date of hearing, respondent provided a paystub of Lashesh, Inc. for period in October of 2003; that was Exhibit 6. Exhibit 7 was another paystub for a period in 2012 at the location respondent is currently working, or was at that time currently working. And then Exhibit 8 was respondent's immigrant visa and the application for same.

These are the documents that were considered by the Court. The Court would note that Exhibit 8 shows that respondent was admitted as the married spouse of a child of a U.S. citizen and was admitted on that basis. These are the documents the Court has considered.

The Court has also considered testimony that respondent and his witness provided. Respondent indicated that he had been married in Yemen, and came to the United States based on his

derivative status to his wife, that he had not been able to find work in the United States initially. He went back to Yemen, he came back to the United States, found work at Lashesh for a period of time, found the work essentially exhausting and not sufficiently remunerative, and, therefore, returned to Yemen.

In Yemen, he indicated that he was arrested. He had lived with his wife in Yemen before the arrest. He had talked with his wife while he was in jail, told her to go back to the United States. He was released after hearings in Yemen, treated in Yemen for a period for the medical condition, and then, ultimately, attempted to return to the United States to the address on Salina in Dearborn. He testified that he did not have bank accounts, he had not paid U.S. taxes, he had supported himself by a store and a khat farm in Yemen, where he grew and then sold the khat at his store. He testified that he is estranged from his wife, and in fact has not spoken with her for quite some time. He has a child, and his child remains in Yemen actually, apparently, operating the store. He does not have a good relationship with his father-in-law or, in fact, with any other family. He is now working in the United States and supporting himself.

Respondent's nephew, a fifth-year resident, I believe, in the United States and a permanent resident, testified. He testified that he is, actually at this point, applying for his residency. He has remained in contact with the respondent, who

has been living in Dearborn since 2010. He was diagnosed with the schizophrenia in Yemen, has been working without much medication recently because of the expense of the drugs or treatment, but with assistance has been able to remain a little bit more organized. Nonetheless, his issues with the disease tend to estrange him from other family members because the disease causes him to act out in ways which people do not find appropriate. He is working. His child remains in Yemen, and the nephew indicated that he may be subject to revenge killing in Yemen because despite the fact that he was acquitted of the charges, the family of the murdered individual does not necessarily accept the findings of the Court to exonerate respondent.

That is the testimony the Court has heard in this matter where the issue is whether respondent has or has not abandoned his status in the United States.

Now, in these matters, per Matter of Wang, Board precedent from 1988, the Government bears the ultimate burden of showing that the respondent's permanent resident status has changed, that the burden is by clear, unequivocal and convincing evidence. The Government is aided by the statutory presumption of abandonment of status by departure for more than one year. That is a presumption which may be overcome by evidence in this matter.

The question truly before the Court is whether respondent

has intended to abandon his status or, as the evidence has unfolded, perhaps his intent to actually reside in the United States.

In terms of indicia, as reflected by the evidence, respondent has no property in the United States, but he does have property, a store and land in Yemen. Respondent has apparently not paid U.S. taxes, although that may have changed since his entry and his work in the United States, but there is no evidence in the record that he has yet paid taxes.

In terms of family, his son is in Yemen. The last information was that his wife is in the United States, his father-in-law is in the United States, but they are estranged. He has not spoken to his wife in many years and has not spoken to his father-in-law for quite some time. Respondent's testimony was that at the time he departed the United States in 2003, his intention was to be gone for seven to eight months and then to return. There was no objective evidence of that intent, no return air ticket or other specific event that would bring respondent back to the United States at that time. Both of his first visits were very short, two to three months at maximum in each instance. One he did not work because he indicated he was not able to find work. The second time he indicated that the work he was doing was too hard and too exhausting, not sufficiently remunerative. On the alternative, he has a regular job in Yemen, a store where he sells khat, and apparently is

able to support himself and his family.

The reason proffered for his failure to return after the last departure and before the December 2010 entry is that he was held on a charge of murder for which he was acquitted. Respondent's suggestion is that the charges for which he was taken into custody in 2004 precluded him from entering again until December of 2010. The evidence in the record suggests that the charges certainly prohibited him from entering the United States before 2006, when he was acquitted and ordered released, but he did not then enter the United States for more than four years, and there is literally no significant documentary or testimonial evidence in the record as to why respondent waited four-plus years to return to the United States. That is the factual and evidential record on which the Court is required to make a determination in this matter.

Because of the documentation in the record concerning his evidence of schizophrenia, the Court must consider the issue of competency in this matter, but having observed the respondent and having observed his witness, who is a physician in training, testify, the Court is convinced that respondent is and has been competent throughout the course of these proceedings such that it is fair under the law for the Court to take action in this matter.

Further, the manner in which the Court tried to structure the proceedings by having the Chief Counsel do the, essentially,

direct examination, having the Court participate in the examination of both respondent and his witness, and by the Court giving both the respondent and the witness the opportunity to identify any areas where respondent or the witness felt that the questioning had not been sufficient, the Court believes that the structural procedures in this matter have been sufficient to fully protect respondent's rights in this matter.

The Court notes that at the Master Calendar hearings, respondent has friends who came with him. At the time of the merits hearing, he had a relative, who is a medical person, here with him. Consequently, on the totality of the record, the Court believes that not only is respondent competent, but also that his rights have been fully protected during the course of these proceedings.

In evaluating the issue of abandonment and the period of time the respondent was gone from the United States in 2003 to the end of 2010, the Court notes that in the Government's closing there was an argument that there was no contingency which explains that long period of absence. The Court disagrees to some extent with that argument. The Court certainly finds that one being arrested for intentional murder and held in custody during the course of those proceedings is an unforeseen event which does excuse a period of time in that seven-plus-year period.

However, looking at the evidence, looking at the

documentation, Exhibit 2, the judgment acquitting respondent was issued by the preliminary court at Rada on April 6, 2006. The release from prison is dated on the upper right-hand corner of the document, it appears to be September 2007, releasing respondent from custody. He was arrested on April 20, 2004. Actually he was arrested on February 16, 2004, but then there is a date of temporary arrest, April 20, 2004. In any event, in 2004 he was arrested. No later than September of 2007 he was released on the judgment, finding him acquitted in April of 2006.

He was treated for his medical condition only from September 27 of 2010 through November 29 of 2010 in Yemen, according to Exhibit 4. There is an unexplained period of three to four years where respondent was free from incarceration, fully, apparently, able to return to the United States, yet did not do so, and it is an unexplained absence.

The Court also is concerned that although respondent came to the United States, left, came to the United States and left, he never appeared to have fully established himself in the United States; rather, it appeared that he was visiting the United States and returning to a domicile in Yemen. So, whether one treats this matter as a permanent resident status never fully adopted or, and the Court will choose to treat it as a permanent resident status adopted but then abandoned by departure for an unexplained, lengthy period of time, well more

than a year, the Court finds in this instance that respondent has in fact abandoned his lawful permanent resident status in the United States, and that the Government charge to that effect is and must be sustained.

Respondent is, therefore, not a lawful permanent resident of the United States and has no other relief available before the Court at this time. As an arriving alien, he may not be considered for voluntary departure. The Court, therefore, is required to order respondent's removal to Yemen on the charges contained in the Notice to Appear.

Please see the next page for electronic signature

DAVID H. PARUCH
Immigration Judge

//s//

Immigration Judge DAVID H. PARUCH

paruchd on April 4, 2013 at 4:53 PM GMT

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE
DAVID H. PARUCH, in the matter of:

SALEH MOHHAMED OTAIFAH

A055-775-988

DETROIT, MICHIGAN

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.

Jean Shiffer

JEAN SHIFFER (Transcriber)

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MARCH 12, 2013

(Completion Date)