U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: FARES, ALI

A 047-654-200

Date of this notice: 4/30/2013

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:
Creppy, Michael J.

lucasd
Userteam: Docket

File: A047 654 200 – Honolulu, HI

Date: APR 30 2013

In re: ALI FARES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gordon Yang, Esquire

ON BEHALF OF DHS: Heith M. Kaneshige
Acting Chief Counsel

APPLICATION: Section 237(a)(1)(H) waiver

The respondent, a native and citizen of Tunisia, appeals the Immigration Judge's March 12, 2012, decision denying the respondent's application for a waiver of removability under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H), in the exercise of discretion.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Since the respondent's application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act.

The Immigration Judge set out the procedural history noting that the respondent's application for naturalization was denied by the Department of Homeland Security (DHS) because he was not lawfully admitted as a permanent resident of the United States. The DHS found that the respondent was not eligible to be admitted to the United States as a lawful permanent resident because he did not comply with the requirement of his J-1 nonimmigrant status under section 212(e) of the Act. The DHS noted that the respondent did not meet the 2-year foreign residency requirement and he did not obtain a waiver to the 2-year foreign residency requirement under section 212(e) of the Act. In November of 2009, the DHS filed a Notice to Appear (NTA) with the Immigration Court, charging the respondent with removability under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), as being inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant with no valid immigrant visa or entry document (Exh. 1). In June of 2011, the respondent's request for a section 212(e) waiver was denied. In August of 2011, the respondent filed a request for a waiver under section 237(a)(1)(H) of the Act.

Initially we note that we agree with the Immigration Judge that the DHS has demonstrated by clear and convincing evidence that the respondent is removable as charged. The respondent applied for a waiver under section 237(a)(1)(H) of the Act asserting it would waive his

misrepresentation on his Application for Immigrant Visa and Alien Registration and that it would waive the 2-year foreign residence requirement under section 212(e) of the Act.

In her decision, the Immigration Judge noted that under section 237(a)(1)(H) of the Act, an alien must establish that he is the spouse, parents, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence and must also demonstrate that he is "otherwise admissible" at the time of his admission. The Immigration Judge concluded that the respondent was not "otherwise admissible" at the time of his admission because he had not met either the 2-year foreign residency requirement or received a waiver under section 212(e) of the Act.

We agree with the Immigration Judge that the respondent is not eligible for a waiver under section 237(a)(1)(H) of the Act because he was not "otherwise admissible" at the time of his admission. Section 212(e) of the Act, 8 U.S.C. § 1182(e). The respondent concedes that, having been admitted to the United States under section 101(a)(15)(J) of the Act, 8 U.S.C. § 1101(a)(15)(J), he was subject to the 2-year home residency requirement. He argues, however, that a waiver under section 237(a)(1)(H) of the Act waives the 2-year foreign residence requirement under section 212(e) of the Act. We reject the respondent's argument for several reasons. First, section 212(e) of the Act is clear. It requires a 2-year home residence following completion of schooling in the United States, and it provides for a waiver of that requirement. It applies to all aliens who came to the United States pursuant to section 101(a)(15)(J) of the Act in order to receive graduate medical education or training. We note that section 212(e) of the Act is unambiguous, and if Congress wanted to allow exemptions from the 2-year foreign residency requirement it could have done so explicitly. For these reasons, the respondent is ineligible for waiver under section 237(a)(1)(H) of the Act because he did not satisfy the 2-year foreign residency requirement and was therefore not "otherwise admissible" at the time of his admission. Accordingly, the respondent's appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled,

or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
300 Ala Moana Blvd., Room 8-112
Honolulu, HI 96850

File No.: A047 654 200	)	Date: March 12, 2012
	)	
In the Matter of	)	
	)	**IN REMOVAL PROCEEDINGS**
Ali FARES,	)	HON
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(A) of the Immigration and Nationality Act

APPLICATIONS: Section 212(e) Waiver; 237(a)(1)(H) Waiver

ON BEHALF OF Respondent:
David McCauley, Esquire
1003 Bishop Street, Suite 1600
Honolulu, HI 96813

ON BEHALF OF THE DHS:
Heith Kaneshige, Assistant Chief Counsel
595 Ala Moana Blvd.
Honolulu, HI 96813

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Ali Fares ("Respondent") is a married, male, native and citizen of Tunisia. *See* Exhibits 1, 2. On March 30, 1993, Respondent was admitted to the United States as a nonimmigrant J-1 student, to pursue his Ph.D. in Agronomy, which was partially funded by the A.I.D. Technology Transfer Project, program number G-2-0263. *Id.* In December 1999, Respondent departed the United States and went to Australia where he remained for approximately one year. *Id.* On December 31, 2000, Respondent was admitted to the United States at New York City, New York, as a DV2 immigrant. *Id.*

On August 31, 2006, Respondent filed the form N-400, *Application for Naturalization* with the Department of Homeland Security ("DHS"). *See* Exhibit 2. On September 10, 2009, Respondent's application was denied under INA § 316.2, because he was not lawfully admitted as a permanent resident of the United States. *Id.* Specifically, the DHS found that Respondent was not eligible to be admitted to the United States as a lawful permanent resident because he failed to comply with the requirements of his J-1 nonimmigrant status under INA § 212(e). *Id.* Under INA § 212(e), no person admitted under INA § 101(a)(15)(J) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence shall be eligible to apply for an immigrant visa, or

for permanent residence until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States. The DHS explained that prior to Respondent's immigrating to the United States on December 31, 2000, Respondent was not physically present in Tunisia and he failed to obtain a waiver to the 2-year foreign residence requirement under Section 212(e), and therefore, he did not lawfully enter the United States as a permanent resident, rendering him ineligible for naturalization. *See* Exhibit 2.

On November 5, 2009, the DHS served Respondent with the form I-862, *Notice to Appear* ("NTA"), charging him as removable under INA § 237(a)(1)(A), in that at the time of entry or of adjustment of status, Respondent was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: alien immigrants who are not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by the Act, or who are not in possession of a valid unexpired passport, or other suitable travel document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to Section 212(a)(7)(A)(i)(I). Exhibit 1. On January 11, 2010, the charging document was filed with the Honolulu Immigration Court, thereby vesting this Court with jurisdiction over these proceedings. *See* 8 C.F.R. § 1003.14(a).

At a master calendar hearing on March 1, 2010, the DHS submitted evidence in support of its argument that Respondent is removable. *See* Exhibit 2. Respondent, with the assistance of counsel, admitted allegations one through five contained in the NTA and conceded removability. Respondent indicated that this is not an asylum, withholding of removal or Convention Against Torture case and designated Tunisia as the country of removal. Respondent asserted that he was seeking a 212(e) waiver from the Department of State.

On April 23, 2010, Respondent filed a motion to continue, which was granted. *See* Exhibit 3. On July 30, 2010, Respondent filed another motion to continue, which was granted. *See* Exhibit 4. On November 16, 2010, Respondent filed another motion to continue, which was granted. *See* Exhibit 5. On February 10, 2011, Respondent filed a motion for administrative closure, which was denied, because the DHS did not agree. *See* Exhibit 6. At a master calendar hearing on June 27, 2011, Respondent informed the Court that his request for a Section 212(e) waiver was denied.

On August 26, 2011, Respondent filed a request for a waiver under INA § 237(a)(1)(H), along with evidence in support of his request. *See* Exhibit 7. On November 28, 2011, Respondent filed a motion to advance his individual hearing. *See* Exhibit 8. On January 3, 2012, Respondent filed supplementary evidence. *See* Exhibit 9. On January 12, 2012, the DHS filed evidence in support of its position that Respondent is removable and not eligible for a 237(a)(1)(H) waiver. *See* Exhibit 10.

On January 13, 2012, Respondent appeared for an individual hearing. At the hearing, he

requested additional time to seek prosecutorial discretion or administrative closure with the DHS, which was granted. Respondent's individual hearing was rescheduled to February 8, 2012. On January 30, 2012, Respondent filed a memorandum in support of his argument that he is eligible for a 237(a)(1)(H) waiver. *See* Exhibit 11.

On February 8, 2012, Respondent again appeared for an individual hearing and informed the Court that he and the DHS did not have a joint motion to file. The DHS agreed to administrative closure but Respondent declined, stating that he wanted a resolution to his immigration status. Respondent explained that he had contacted Senator Inouye's office but they were unable to assist in his 212(e) waiver request with the Department of State. Respondent requested additional time to prepare, which was granted. Respondent's individual hearing was rescheduled to June 1, 2012. On February 29, 2012, Respondent filed a motion to advance his individual hearing. *See* Exhibit 12. On March 12, 2012, Respondent appeared for his individual hearing. Respondent asserted that he is eligible for relief under INA § 237(a)(1)(H) alone and made closing arguments. Respondent requested voluntary departure in the alternative.

II. ANALYSIS

The DHS demonstrated by clear and convincing evidence that Respondent is removable as charged in the NTA. The DHS alleged that Respondent was not eligible to be admitted to the United States as a lawful permanent resident in December 2000 because he made a material misrepresentation on his visa application and failed to comply with the requirements of his J-1 nonimmigrant status under INA § 212(e). In support of its argument, the DHS submitted a copy of Respondent's immigrant visa application. *See* Exhibit 2. The application asked if Respondent was "an alien who is a former exchange visitor who has not fulfilled the 2-year foreign residence requirement [212(e)]" and he checked the box marked, "No." *Id.*

Respondent admitted that he failed to comply with the requirements of his J-1 nonimmigrant status under INA § 212(e), and claimed that he did not know about the intricacies of the 2-year foreign residence requirement. Respondent admitted that he made a misrepresentation on his visa application, and he conceded that he is removable as charged under INA § 237(a)(1)(A) because, at the time of his entry, he was inadmissible as an alien immigrant who was not in possession of a valid unexpired immigrant visa.

A. 212(e) Waiver

Respondent sought a waiver of the two-year foreign residence requirement of Section 212(e) with the Department of State and the Department of Homeland Security. *See* Exhibit10. Under 212(e),

> No person admitted under section 101(a)(15)(J), (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by

the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of the status under 101(a)(J) was a national or resident of a country which the Director of the former United States Information Agency (now the Secretary of USDOS), pursuant to the regulations prescribed by him, had designated as clearly requiring the skills in which the alien was engaged, or (iii) or who came to the United States in order to receive graduate medical education or training shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), . . . the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver required by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government Agency on behalf of the alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): and provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

It is undisputed that Respondent was admitted to the United States pursuant to INA § 101(a)(15)(J)(i) and that he was ineligible to apply for admission to the United States as a permanent resident in 2000 because he had not resided and been physically present in Tunisia for an aggregate of at least two years following departure from the United States. Therefore, Respondent is removable under INA § 237(a)(1)(A). Respondent applied for a waiver under INA § 212(e); however, it was denied by the Department of State and the Department of Homeland Security. This Court cannot grant a waiver under INA § 212(e) in this case as a favorable recommendation of the Secretary of State is a necessary prerequisite to approval of an application for a waiver of the two-year foreign residence requirement. *See Matter of Tayabji*, 19 I&N Dec. 264 (BIA 1985).

B. 237(a)(1)(H) Waiver

Respondent applied for a waiver under INA § 237(a)(1)(H), asserting that it would waive his misrepresentation for answering "No" to question J on the form 230, *Application for*

Immigrant Visa and Alien Registration. See Exhibits 2, 10. Respondent also asserts that the 237(a)(1)(H) waiver waives the 2-year foreign residence requirement under INA § 212(e).

The provisions of section 237(a)(1) of the Act relating to the removal of an alien on the ground that he was inadmissible at the time of admission as an alien described in INA § 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact at the time of admission, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien who meets the requirements under section 237(a)(1)(H)(i) or (ii) of the Act. The Board of Immigration Appeals ("BIA") has also found that INA § 237(a)(1)(H) authorizes a waiver for charges of inadmissibility under INA § 212(a)(7)(A)(i)(I), for a lack of a valid visa or entry document. *See Matter of Fu*, 23 I&N Dec. 985, 988 (BIA 2006). The BIA has recognized that Congress's intent in enacting INA § 237(a)(1)(H) was to foster, in appropriate cases, the unity of families composed, in part, of U.S. citizens or LPRs. *See Matter of Tijam*, 22 I&N Dec. 408, 416-17 (BIA 1998).

An alien meets the requirements of INA § 237(a)(1)(H)(i) if he is the spouse, parent, son, or daughter of a citizen of the U.S. or of an alien lawfully admitted to the U.S. for permanent residence. INA § 237(a)(1)(H)(i)(I). However, the alien must also have been in possession of an immigrant visa or equivalent document and have been otherwise admissible at the time of such admission, except for the grounds of inadmissibility specified under INA §§ 212(a)(5)(A) (not in possession of a labor certification) and (7)(A) (not in possession of a valid immigrant visa or other required documents or whose visa has was not issued in compliance with section 203 of the Act), which were a direct result of that fraud or misrepresentation. INA § 237(a)(1)(H)(i)(II). Here, Respondent is the spouse of a U.S. citizen and the father of four U.S. citizen children. However, although a waiver under INA § 237(a)(1)(H) could waive the misrepresentation on his visa application, Respondent was not "otherwise admissible" at the time of his admission as a permanent resident in 2000, because he had not resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States. Moreover, Respondent has not received a waiver under INA § 212(e), the exclusive means to waive the 2-year foreign residence requirement. *Matter of Musharraf*, 17 I&N Dec. 462 (BIA 1980).

Respondent argues that he is eligible for relief and not subjected to the requirements under INA § 212(e), because INA § 237(a)(1)(H) can be used in lieu of such a waiver, relying on *Chuey v. INS*, 439 F.2d 244, 249 (9th Cir. 1970). However, this case was explicitly overturned by the United States Supreme Court in *Reid v. INS*, 420 U.S. 619, 620 (1975) (holding that a waiver under former INA § 241(f) does not extend to any grounds of inadmissibility specified in INA § 212(a) other than former subsection (19)). The Court also notes that the Ninth Circuit has previously determined that the Government is not estopped from enforcing the two-year foreign residence requirement under INA § 212(e), even when it engages in negligent misconduct. *See Mukherjee v. INS*, 793 F.2d 1006 (9th Cir. 1986) (denying the alien's equitable estoppel claim where the consular officer told the alien that he would not be subjected to the 2-year foreign residence requirement but the INS found him ineligible to adjust status under INA § 212(e)).

While Respondent certainly merits relief as a matter of discretion, Respondent is statutorily ineligible to apply for a 237(a)(1)(H) waiver because he was not "otherwise admissible" at the time of his admission in 2000. *See Matter of Tijam*, 22 I&N Dec. at 412-16.

ACCORDINGLY, the following order shall be entered:

ORDER

IT IS ORDERED that Respondent's application for a waiver under INA § 212(e) is DENIED.

IT IS ORDERED that Respondent's application for a waiver under INA § 237(a)(1)(H) is DENIED.

IT IS HEREBY ORDERED that Respondent be GRANTED voluntary departure at the conclusion of proceedings under INA § 240B(b), in lieu of removal, without expense to the Government, on or before May 11, 2012, or any extensions as may be granted by the Field Office Director, Department of Homeland Security, and under any other conditions the Field Office Director may direct.

IT IS FURTHER ORDERED that Respondent post a voluntary departure bond in the amount of **$500** with the Department of Homeland Security within 5 business days.

IT IS FURTHER ORDERED that if any of the above ordered conditions are not met as required, or if Respondent fails to depart as required, the above grant of post-conclusion voluntary departure shall be withdrawn without further notice or proceedings and the following order, entered pursuant to 8 C.F.R. § 1240.26(d), shall become immediately effective: Respondent shall be removed to **Tunisia** on the charge contained in the Notice to Appear.

Respondent is HEREBY ADVISED that if he fails to voluntarily depart the United States within the time specified, or within any extensions that may be granted by the Department of Homeland Security, Respondent will be subject to the following penalties:

1. Respondent will be subject to a civil monetary penalty of not less than $1,000 and not more than $5,000. INA § 240B(d). The Court has set the presumptive civil monetary penalty amount of $3,000. 8 C.F.R. § 1240.26(j).
2. Respondent will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status. INA § 240B(d).

Respondent is FURTHER ADVISED that if he appeals this decision Respondent must

provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if Respondent does not submit timely proof to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).

Respondent is FURTHER ADVISED that if he or she does not appeal this decision and instead files a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the above penalties for failure to depart voluntarily under section 240B(d) of the Act, 8 U.S.C. § 1229c(d), will not apply. 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).

Dayna Beamer

DAYNA BEAMER
Immigration Judge