U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SOWAH, THEOPHILUS ANUM

A 078-393-756

Date of this notice: 3/24/2014

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:
Adkins-Blanch, Charles K.

schwarzA
Userteam: Docket

File: A078 393 756 – Atlanta, GA

Date: MAR 24 2014

In re: THEOPHILUS ANUM SOWAH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eli A. Echols, Esquire

ON BEHALF OF DHS: Renae M. Hansell
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's October 6, 2011, decision terminating proceedings. The appeal will be dismissed.

The Immigration Judge concluded that the DHS did not sustain its burden of proving by clear and convincing evidence that the respondent was inadmissible to the United States at the time of entry or at the time of adjustment of status by procuring or seeking to procure a visa or other admission by fraud or by willfully misrepresenting a material fact under section 212(a)(6)(C)(i) of the Act. *See* section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A). Thus, the issue on appeal is whether the Immigration Judge properly terminated proceedings.

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 Ghana. He was admitted into the United States as a visitor on December 24, 1998 (Exh. 1).[1] Thereafter he entered into a marriage to Helen Weah, a United States citizen, in July 2000. The couple divorced on May 24, 2004, although they continued living together as husband and wife for nearly another year. In June 2004, the respondent and Ms. Weah appeared for a joint interview in support of the visa petition she had filed on his behalf as the spouse of a United States citizen. The visa petition filed on behalf of the respondent was approved on June 30, 2004, and he was granted lawful resident status.

The DHS argues that the respondent procured his visa petition and lawful status by fraud or willful misrepresentation because he knew or should have known he was divorced at the time of his joint interview.

[1] The DHS stated in its appeal brief that the respondent actually entered the United States on August 9, 1997, as a non-immigrant visitor with authorization to remain for a temporary period not to exceed February 8, 1998 (DHS Br. at 2).

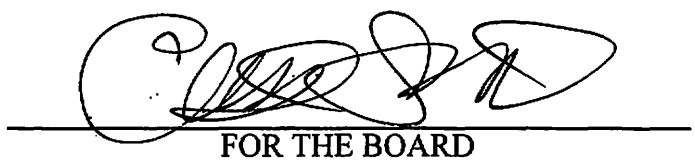
On appeal, the DHS argues that the Immigration Judge erred in holding that the evidence did not show by clear and convincing evidence that the is removable under section 237(a)(1)(A) of the Act, as an alien inadmissible at the time of entry due to fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i); 8 C.F.R. § 1240.8(a). This is a legal determination that we review de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

We do not find the Immigration Judge's fact-finding clearly erroneous. Although the record shows that the respondent received the initial divorce filing, he testified that he did not receive final divorce papers (Tr. at 13-15). Following what respondent described as a misunderstanding, his mother-in-law visited the couple and the respondent believed that the misunderstanding was resolved (Tr. at 22). Although the marriage was legally terminated by his wife more than a month before their joint interview, the Immigration Judge observed that the respondent believed that the marriage was still valid.

The Immigration Judge noted that several facts supported the respondent's belief that the marriage remained intact, including his wife's appearance for the joint interview in support of the petition. Moreover, the couple continued living together until 2005, substantiating the respondent's belief that they were still married and that their problems were resolved short of a final divorce. While the respondent's wife should have known that the divorce was final prior to the joint interview, the record does not show that the respondent knew (Tr. at 20-24). Since the evidence suggests that the respondent believed he was still legally married when he appeared for the joint interview, we affirm the Immigration Judge's conclusion that the DHS did not carry its burden of proving by clear and convincing evidence that the respondent sought to procure lawful status by fraud or by willfully misrepresenting a material fact as charged under sections 237(a)(1)(A) and 212(a)(6)(C)(i) of the Act (Exh. 1).

Accordingly, we affirm the Immigration Judge's decision terminating these proceedings. The following order is entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A078-393-756 October 6, 2011

In the Matter of

THEOPHILUS ANUM SOWAH	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(1)(A) of the Immigration and Nationality Act; Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATIONS:

ON BEHALF OF RESPONDENT: ELI ECHOLS

ON BEHALF OF DHS: RENAE HANSELL

ORAL DECISION OF THE IMMIGRATION JUDGE

This case came before the Court as a result of a Notice to Appear that was issued by the Department of Homeland Security. The charging document alleges that the respondent is a native and citizen of Ghana, and that he is removable from the United States pursuant to Section 237(a)(1)(A) and Section 212(a)(6)(C)(i) of the Immigration and Nationality Act. The

respondent admits allegations 1, 2, 3, and 4 of the Notice to Appear. Later, he would indicate that he admits part of the factual allegations in allegation number 5. The respondent denies engaging in any fraudulent conduct in this case. The issue is to decide removability and whether the Government can sustain the charge of removability.

ANALYSIS AND DISCUSSION

The disputed allegation in this case is allegation number 5. The first part of the allegation number 5 alleges that the respondent engaged in fraudulent conduct and it includes a to wit clause. The problem with the to wit clause is that there is no allegation of fraud by the respondent. It simply asserts a fact that he was divorced about 36 days before his interview. There is no allegation that respondent fraudulently sought to acquire any benefits or that he knew or should have known of his divorce, or that he misrepresented any facts at the interview. The respondent is not on notice of any fraudulent conduct in this case.

The Court advised the Government of what appeared to be a deficiency prior to the start of hearing. The Government is satisfied with the allegation. The Court finds that the allegation number 5, even if true, does not assert the basis for removability in this case. The Court finds that there is no evidence of fraud based on the factual allegations set forth in number 5. The Court finds that the respondent is not removable

based on the allegations in the Notice to Appear. The Court will, therefore, terminate the proceedings and not sustain the charge of removal.

The Court will get to the merits of this case so that if the issue concerning the deficiency in the Notice to Appear is overturned by the Board, then there will be a sufficient record of this case. The Court has listened to the respondent's testimony in this matter. The respondent appears credible and consistent. Respondent testified about the relationship that he had with his wife. He said that they had some problems in 2004 and he thought that the problems had been reconciled. The respondent said that he and his wife continued to live together as man and wife after the problems had been reconciled. They did not separate until sometime in 2005.

Respondent acknowledges that at some point there were documents that were submitted to him at his work place, which may have been divorce papers. However, he said that he thought that the matter was resolved after that when discussion was held between himself and his ex-mother-in-law. Respondent understood that there was no divorce and had not received any final divorce after apparently receiving the documents at work. The Government has presented no evidence that counter respondent's contention that he did not actually know of the divorce after signing the papers at his work.

What is interesting in this case is that the

respondent and his wife lived together for a period of approximately a year after the divorce became final. The Government has not alleged that the respondent somehow engaged in a fraudulent marriage, and that he and his wife did not engage in a bona fide marriage. And the Court certainly takes seriously the respondent's contention that the fact that he and his wife continued to live together provided the basis for him to believe that they were in fact still married and that his wife had dropped the attempts to seek a divorce. It would seem that the wife's presence at the hearing suggests that she in fact believed she was going there in order to engage in an interview for the purposes of the respondent subsequently getting his adjustment of status. There is no statement from the wife that she was paid in order to marry the respondent. There seems to be no evidence that the respondent entered into a fraudulent marriage at the outset of this case.

The Court is left with somewhat unusual facts. There appears to have been a valid marriage, and there was a subsequent divorce. The respondent says he did not know of the divorce because he and his wife had presumably reconciled and he had not received any final divorce papers. He said that he did not know that he was divorced at the time he went to the interview. The Court accepts respondent's testimony and finds his explanation to be credible.

The respondent's statements seem reasonable under the

circumstances. After all, he had been living with his wife and they appeared at the interview together. In view of the foregoing, if the Court were to reach the merits of this case, the Court would find that the respondent's testimony that he did not know that he was divorced at the time of the interview is worthy of credence. The Court will find that fact to have been established by the respondent.

Perhaps the proper course in this case is to have denied the respondent his adjustment of status because he was legally not entitled to it. If the respondent was in fact divorced, perhaps he should not be eligible to adjust his status on the basis of a visa that somehow because null and void upon the date of his divorce. In that case, presumably the respondent would then have to file for a waiver of the joint filing requirement. However, the Government has not proceeded on the grounds that the respondent was not statutorily eligible to receive the visa. Rather, the Government has somehow charged the respondent has engaged in fraud. They have presented no evidence that respondent knowingly engaged in fraud at the time of the interview. There was no statement from anyone in this case that the respondent knew or should have known. The Government relies on documents that were signed in the divorce proceedings. However, respondent says that he did not receive copies of those documents, and in any event thought that the divorce was not proceeding and did not receive a copy of the

final divorce decree. There is no evidence to contradict that in this case.

In view of the foregoing, the Court would terminate these proceedings. First, because the Government has failed to allege sufficient facts to support a finding that the respondent engaged in fraud, and therefore is removable under 212(a)(6)(C)(i) of the Immigration and Nationality Act. And, to the extent that the Court reaches the merits of this case, the Court finds that respondent has not been shown to have engaged in any fraudulent conduct in this case, or any willful misrepresentation. Any errors in this case appear to be innocent, and the Court will therefore not sustain the charge of removability. The Court will enter the following order in this case.

ORDER

IT IS HEREBY ORDERED that the proceedings against respondent be terminated.

EARLE B WILSON
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE EARLE B WILSON, in the matter of:

THEOPHILUS ANUM SOWAH

A078-393-756

ATLANTA, GEORGIA

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.

Michelle T. Brown

MICHELLE T. BROWN (Transcriber)

DEPOSITION SERVICES, Inc.

NOVEMBER 29, 2011

(Completion Date)