U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - ELZ
625 Evans Street, Room 135
Elizabeth, NJ 07201

Name: ARROBO, ANIBAL ROLANDO **A075-449-130**

Date of this notice: 7/1/2011

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:
Miller, Neil P.

File: A075 449 130 - Elizabeth, NJ

Date: JUL - 1 2011

In re: ANIBAL ROLANDO ARROBO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Arturo Suarez-Silverio, Esquire

ON BEHALF OF DHS: Patricia M. Medeiros
Assistant Chief Counsel

APPLICATION: Reconsideration

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated December 9, 2010. We dismissed the respondent's appeal from the Immigration Judge's decision which denied his motion to reopen proceedings. The present motion will be denied.

The respondent's motion to reconsider (filed on January 10, 2011) is timely. We find no *material* factual or legal errors in our December 9, 2010, decision. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).

We will, however, reconsider sua sponte. All of the statements made in the first full paragraph of page 2 of our December 9, 2010, decision are true. Specifically, our statements regarding the dates(s) of the respondent's last arrival in the United States, his answer to Form I-485, Part 3, Question 10 (Motion Exh. 1 to motion to reopen filed in Feb. of 2009), and that EOIR records show he was granted voluntary departure by an Immigration Judge in Newark, New Jersey, on February 16, 2000, are all true.

However, the statements are all dicta since the respondent's appeal from the Immigration Judge's denial of the motion to reopen was dismissed because he did not show prima facie eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (the Board may deny a motion to reopen proceedings where a prima facie case for the relief sought has not been established). The respondent did not make a prima facie showing that a visa petition was filed on his behalf on or before April 30, 2001, and that any such petition was approvable when filed. *See* BIA Dec. 9, 2010, at 1-2.

To avoid any possible due process concerns, we will amend our December 9, 2010, decision by deleting the first full paragraph of page 2. There is thus no reason to remand this case to the Immigration Judge.

Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: We reconsider sua sponte.

FURTHER ORDER: We amend our December 9, 2010, decision by deleting the first full paragraph of page 2.

FOR THE BOARD

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Elizabeth, NJ 07201

Name: ARROBO, ANIBAL ROLANDO **A075-449-130**

Date of this notice: 12/9/2010

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:
Malphrus, Garry D.

File: A075 449 130 - Elizabeth, NJ

Date:

DEC - 9 2010

In re: ANIBAL ROLANDO ARROBO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arturo S. Suarez-Silverio, Esquire

APPLICATION: Reopening; adjustment of status

The respondent, a native and citizen of Ecuador, appeals from the decision of the Immigration Judge dated March 13, 2009, denying his motion to reopen his removal proceedings. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. §1229a(c)(7). The appeal will be dismissed.

The Board reviews the findings of fact made by the Immigration Judge under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The Immigration Judge granted the respondent voluntary departure on January 7, 2009. The respondent subsequently married a United States citizen and filed a timely motion to reopen for the purpose of applying for adjustment of status. Although we agree with the respondent's contention on appeal that the Immigration Judge improperly required that the I-130 petition filed by the respondent's wife to be approved in order to provide a basis for reopening, we nonetheless affirm the Immigration Judge's denial of the respondent's motion to reopen.

The Immigration Judge correctly found that the respondent has not established prima facie eligibility to adjust his status. *See* 8 C.F.R. § 1003.23(b)(3). Although the respondent claims that he is eligible to adjust under section 245(i) of the Act, 8 U.S.C. § 1255(i), the Immigration Judge properly concluded that the respondent has not met his burden of proof because he provided no evidence that he was the beneficiary of a petition filed before April 30, 2001. Section 245(i)(1)(B)(i) of the Act. The Immigration Judge therefore properly denied the respondent's motion to reopen.

With his appeal brief, the respondent included a copy of an I-130 petition purportedly signed and dated by his former spouse in 1997, to show that he is the beneficiary of a petition that would make him eligible to adjust his status under section 245(i) of the Act. The Board is an appeal body and does not generally consider new evidence submitted for the first time on appeal. *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). We view the respondent's new evidence as a motion to remand and conclude that the evidence does not warrant remand. It does not establish

that a petition was ever filed. The respondent has provided no evidence that this petition was properly filed and has not shown that it was approvable when filed. 8 C.F.R. § 1245.10(a)(1)(i)(A).

Moreover, the respondent has not met his burden of making a prima facie showing that he is eligible to receive an immigrant visa and admissible to the United States for permanent residence. *See* section 245(i)(2) of the Act. The respondent states in his appeal brief that he last entered the United States without inspection in July 2001. Respondent's Brief at 2. Likewise, he admitted the allegation on the Notice to Appear that he entered the United States without inspection on or about July 2001. However, both I-130 petitions submitted by the respondent indicate that he entered the United States without inspection on October 25, 1994. Further, his I-485 application, signed by the respondent and dated February 17, 2009, affirmatively answers the question, "Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, or other documentation, entry into the United States, or any immigration benefit?" Moreover, our electronic database reflects that the respondent was granted voluntary departure by an Immigration Judge on February 16, 2000. The respondent has therefore not met his burden of proving prima facie eligibility for adjustment of status. *See generally Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).

We therefore affirm the Immigration Judge's denial of the respondent's motion to reopen. Further, we disagree with the respondent's contention on appeal that the Immigration Judge erred by not staying his voluntary departure period. *See Dada v. Mukasey*, 554 U.S. 1 (2008). Moreover, upon our de novo review, we conclude that even if otherwise eligible for that relief, the respondent has not shown that he merits voluntary departure as a matter of discretion. *See Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). The appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD