U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: K[redacted], G[redacted]

A [redacted]-758

Date of this notice: 9/2/2015

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

schwarzA
Userteam: Docket

File: A[redacted]758 - Detroit, MI

Date: SEP - 2 2015

In re: G[redacted] K[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: George P. Mann, Esquire

ON BEHALF OF DHS: Jason A. Ritter
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] - Conditional resident status terminated

Lodged: Sec. 237(a)(1)(G)(i), I&N Act [8 U.S.C. § 1227(a)(1)(G)(i)] - Marriage fraud - marriage annulled or terminated

APPLICATION: Waiver of inadmissibility under section 216(c)(4)(B) of the Act; waiver under section 237(a)(1)(H) of the Act; adjustment of status

The respondent, a native and citizen of India, appeals the Immigration Judge's December 26, 2012, decision.[1] The Immigration Judge denied the respondent's requests for a waiver under section 216(c)(4)(B) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1186a(c)(4)(B); adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), on the basis of an approved visa petition filed by the respondent's second husband; and a waiver under section 237(a)(1)(H) of the Act, 8 U.S.C. § 1227(a)(1)(H). The Department of Homeland Security ("DHS") opposes the appeal. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7) (2015). The record will be remanded.

The respondent married her first husband, a United States citizen, in India on January 19, 1999. After the first husband filed a visa petition on her behalf, which was thereafter approved, she was admitted to the United States as a conditional permanent resident on February 12, 2000. On August 4, 2000, the respondent's marriage with her first husband (i.e., on which her

[1] While the appeal was pending, the respondent filed a motion to administratively close proceedings, or alternatively, to hold the appeal in abeyance to allow the respondent to apply for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). The respondent's motion makes clear that she requests such measures only should this Board be inclined to dismiss her appeal. *See* Respondent's Motion at 2. Given our disposition, we need not address the respondent's arguments raised in her motion.

conditional residency was premised) was judicially terminated. *See* I.J. at 2-3; *see also* DHS's Br. at 2-3. On March 26, 2001, she filed a Petition to Remove Conditions on Residence (Form I-751)—while claiming that she entered into a good faith marriage—which was denied by the DHS on December 12, 2003 (Exh. 2-A). *See* section 216(c)(4)(B) of the Act. The respondent's conditional permanent resident status terminated as of February 12, 2002, and while she conceded removability under section 237(a)(1)(D)(i) of the Act (Exh. 1), she denied removability under section 237(a)(1)(G)(i) of the Act, while also requesting a waiver of any such removability under section 237(a)(1)(H) (Exh. 1-A). *See* I.J. at 2-3, 11 (noting that the respondent married another individual on September 8, 2002—a lawful permanent resident of the United States who filed a visa petition on her behalf, which was subsequently approved—and that she accordingly "requested adjustment of status . . . with a concomitant 237(a)(1)(H) waiver to waive any grounds of inadmissibility based upon any finding" of fraud made by the Court).

After the conclusion of the respondent's hearing, the Immigration Judge issued a written decision denying her application for a waiver under section 216(c)(4)(B) of the Act upon holding that she did not establish that the marriage with her first husband was entered into in good faith (I.J. at 19). The Immigration Judge also held that section 237(a)(1)(G)(i) of the Act provides that a marriage terminated within 2 years of an applicant's admission is presumptively fraudulent and that the respondent in this case did not rebut the statutory presumption. The Immigration Judge also denied the respondent's request for a waiver under section 237(a)(1)(H) of the Act as a matter of discretion after holding that (1) she and her family were seeking a way for her to join her parents and other siblings in the United States, (2) her equities "were all acquired after she engaged in a fraudulent marriage," and (3) the evidence of hardship did not "offset[] the seriousness of the fraud" (I.J. at 20-23).[2]

However, after the Immigration Judge held that the respondent did not show that she had entered into a good faith marriage, the Immigration Judge appeared to find that section 204(c) of the Act, 8 U.S.C. § 1154(c), bars the respondent from adjusting status. *See* I.J. at 22; *see also* I.J. at 20 (noting that "[t]he provisions of section 204(c) preclude an alien who has been determined to have entered into a marriage for the purpose of evading the immigration laws from obtaining and arguably using an approved immigrant petition," while stating that "[t]o grant adjustment of status under section 245 of the Act to the respondent would be to defeat the provisions of section 204(c)," and that the "Court will not undertake that action"). As argued by the respondent on appeal (Respondent's Br. at 5, 16-17, 24), a finding under section 204(c) of the Act is to be made by the district director—which did not occur in this case—in the course of his or her adjudication of the visa petition filed on behalf of the beneficiary. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990); *Matter of Samsen*, 15 I&N Dec. 28, 29-30 (BIA 1974) (stating that a section 204(c) determination should be made independently by the district director, based on the evidence actually before him or her).[3]

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[2] The DHS has not disputed that the waiver found at section 237(a)(1)(H) of the Act is available to waive deportability under section 237(a)(1)(G)(i) of the Act.

[3] As noted above, the record in the instant case reflects that the DHS approved the visa petition filed on behalf of the respondent following her second marriage. If the DHS believed that the (continued…)

As such, an Immigration Judge's finding that the respondent failed to show that she entered her marriage in good faith does not bar her from adjustment of status. *See* section 245 of the Act, 8 U.S.C. § 1255; *see also* section 204(c) of the Act (a visa petition shall not be approved for an individual who has entered his or her marriage for the purpose of evading the immigration laws of the United States); *see generally Singh v. U.S. Dept. of Justice*, 461 F.3d 290, 294 n.3 (2d Cir. 2006) (discussing that an alien's failure to show he entered into his marriage in good faith does not necessarily establish that his marriage was a sham under section 204(c) of the Act).

In sum, a remand for further proceedings is necessary as the above unresolved issues preclude the Board from fully adjudicating the instant appeal. On remand, the Immigration Judge shall issue a new decision addressing the respondent's eligibility for adjustment of status, whether she is otherwise deserving of such relief as a matter of discretion, and any other issue relevant to these proceedings.[4] The parties shall be given an opportunity to file briefs and further testimony may be taken, if necessary. *See Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (a remand is effective for the stated purpose and for the consideration of all matters which the Immigration Judge deems appropriate in the exercise of his or her discretion). We need not resolve at this time the other arguments raised in the respondent's brief on appeal. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

(...continued)
respondent previously entered into a fraudulent marriage in order to evade the immigration laws, the DHS could have denied the visa petition pursuant to section 204(c) of the Act or, if it determined that the visa petition was approved in error, it could have instituted revocation proceedings. *See Matter of Stockwell*, 20 I&N Dec. 309, 312 (BIA 1991). The DHS to date has not represented that it is seeking to revoke the visa petition. In any event, section 204(c) of the Act does not provide a basis on which an Immigration Judge may deny an application for adjustment of status which is accompanied by an approved visa petition.

[4] For the purposes of determining whether the respondent merits relief as a matter of discretion, we note that it should be kept in mind that a finding of deportability under section 237(a)(1)(G)(i) of the Act does not necessarily mean that an alien committed fraud. Instead, section 237(a)(1)(G)(i) relies on a *presumption* of fraud and places the burden on the respondent to prove otherwise, similarly to the burden placement of section 216(c)(4)(B) of the Act. Further, in exercising discretion, the Immigration Judge should balance the factors set forth in *Matter of Tijam*, 22 I&N Dec. 408, 417 (BIA 1998).