U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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P.O. Box 8728
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Name: K[redacted], D[redacted] N[redacted]

A[redacted]-250

Date of this notice: 9/7/2018

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:
Mullane, Hugh G.
Creppy, Michael J.
Geller, Joan B

Tr:r.C
Userteam: Docket

File: A[redacted]-250 – Boston, MA Date: SEP 07 2018

In re: D[redacted] N[redacted] K[redacted] a.k.a. D[redacted] N[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin R. Winograd, Esquire

APPLICATION: Waiver of removability under section 237(a)(1)(H) of the Act

The respondent, a native and citizen of Kenya and lawful permanent resident of the United States, appeals the February 28, 2017, decision of the Immigration Judge, finding him removable as charged under section 237(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(A), and pretermitted his application for a waiver of removability. Section 237(a)(1)(H) of the Act. The appeal will be sustained and the record remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review 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 was admitted to the United States as a nonimmigrant visitor and was granted lawful permanent resident status on November 14, 2008 (IJ at 3; Tr. at 77). The Department of Homeland Security (DHS) charged the respondent with removability under section 237(a)(1)(A) of the Act, as an alien who was inadmissible at the time of entry or adjustment of status based on fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) (IJ at 3; Exh. 1). In support of this charge, the DHS alleged that the respondent admitted that he procured status as a lawful permanent resident by fraud or by willfully misrepresenting a material fact when, on November 2, 2011, he testified under oath at his naturalization interview that he married a United States citizen in order to obtain lawful permanent residence in the United States (IJ at 5-6; Exh. 3d).

The Immigration Judge determined that the respondent was statutorily ineligible for a section 237(a)(1)(H) waiver because, notwithstanding the fraud or misrepresentation committed in the process of obtaining his adjustment of status as a lawful permanent resident in the United States, he was inadmissible for providing false testimony during the course of these removal proceedings (IJ at 1, 3, 6-9). The Immigration Judge found that the respondent was statutorily ineligible to apply for a section 212(i) waiver of inadmissibility in order to waive the fraud or material misrepresentation committed at the hearing (IJ at 1, 3, 8-9).

On appeal, the respondent does not contest his removability as charged. Rather, the respondent contends that he is statutorily eligible to apply for a section 237(a)(1)(H) waiver of removability to waive fraud that occurred prior to adjusting his status, and does not require a waiver with respect

to the purported false testimony he gave during the hearing before the Immigration Judge (IJ at 2-5, 7-9; Tr. at 107-08, 120-21).

The respondent requested oral argument, and the case was set for oral argument. The DHS has filed a non-opposition to the respondent's request for a remand. The DHS agrees with the respondent that he is not required to seek a waiver under section 212(i) of the Act and argues that remand is appropriate to allow further consideration of the respondent's application for a waiver under section 237(a)(1)(H) of the Act. The respondent takes no position regarding the need for oral argument based on the DHS concession that the respondent is eligible for a waiver under section 237(a)(1)(H) of the Act. The respondent requests resolution of whether the respondent provided "false" testimony by insisting that his marriage was bona fide and remand to a different Immigration Judge.

We will remand the record to the Immigration Court for further proceedings and the issuance of a new decision. The previously scheduled oral argument is canceled. We need not decide whether the respondent provided, or did not provide, "false" testimony as this is, in part, a factual issue that warrants further development before the Immigration Judge.

On remand, the parties should be afforded the opportunity to provide additional evidence and arguments. The Immigration Judge is not bound by any of his prior determinations. Lastly, contrary to the respondent's appellate assertions, assignment to a different Immigration Judge on remand is not warranted.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Oral argument scheduled for September 13, 2018, is canceled.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: [redacted]250 February 28, 2017

In the Matter of

D[redacted] N[redacted] K[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(1)(A) of the Immigration and Nationality Act.

APPLICATIONS: Waiver under Section 237(a)(1)(H) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT: ERIC C. AVERION, ESQUIRE

ON BEHALF OF DHS: MARK SODDER, ESQUIRE

ORAL DECISION OF THE IMMIGRATION JUDGE

SUMMARY OF DECISION

The respondent in these proceedings has sought a waiver under Section 237(a)(1)(H) of the Immigration and Nationality Act. As this Court will set forth below, this Court finds that the respondent is not statutorily eligible for that waiver because he requires a waiver of inadmissibility under Section 212(i) of the Immigration and Nationality Act as this Court finds that the respondent has given false testimony on the witness stand. The respondent is ineligible for a Section 212(i) waiver of removability

because he is not an arriving alien seeking to waive that ground of inadmissibility or an alien in removal proceedings seeking to waive inadmissibility in conjunction with an application for adjustment of status. See Matter of Rivas, 26 I&N Dec. 130, 132-33 (BIA 2013) (holding that a waiver of inadmissibility under Section 212(h) of the Act is not available on a "stand alone" basis to an alien in removal proceedings without a concurrently filed application for adjustment of status); Matter of Abosi, 24 I&N Dec. 204, 205-06 (BIA 2007) (holding that an arriving alien seeking to return to the United States after a trip abroad need not apply for adjustment of status in conjunction with a 212(h) waiver); see also 8 C.F.R. 1245.1(f) (2016) (providing that an adjustment of status application is "the sole method of requesting the exercise of discretion under Section 212(h) of the Act as it relates to the inadmissibility of an alien in the United States).

As this Court will note below, the respondent has never filed a motion to suppress with this Court regarding his sworn statement at issue. That is, the sworn statement that is contained in his own submission at Group Exhibit 4, beginning on page 167. Therefore, the respondent's arguments to the Court today that the officer who took this sworn statement told him that he could either leave with his passport or leave in handcuffs is simply not supported in the record. The Court finds that the sworn statement at Exhibit 4, beginning on page 167, statement that was submitted by the respondent himself, is a true and accurate document. It is a business record provided by the respondent to the Court. It is probative and reliable and the respondent clearly states in this sworn statement that he married his first wife, R[redacted] to obtain a "green card". The respondent, however, has admitted allegation number 4 in the record which states that on November 2, 2011, you testified under oath that you married your United States citizen spouse in order to obtain your lawful permanent resident status. The

respondent argues today, essentially through his testimony, that notwithstanding his admission to allegation 4 in the Notice to Appear and notwithstanding the sworn statement that he has, in fact, offered as his own exhibit without a concomitance motion to suppress that he was forced by the Immigration officer to say that he entered into his marriage to his first wife, [redacted], to obtain a green card. This Court finds that the respondent's testimony on the witness stand is false testimony to the Court today, on February 28, 2017, that that testimony, therefore, renders the respondent in need of a Section 212(i) waiver for having given false testimony on the witness stand today. And because he is not an arriving alien seeking to waive a ground of inadmissibility or an alien in removal proceedings seeking to waive inadmissibility in conjunction with an application for adjustment of status, the Court finds that he is ineligible for such a waiver and therefore his 237(a)(1)(H) waiver is pretermitted.

The respondent in these proceedings is an adult male, native and citizen of Kenya. The respondent was placed into removal proceedings through the issuance of a Notice to Appear dated November 18, 2011. See Exhibit 1. That document is also known as a form I-862. The respondent, through counsel, filed written pleadings at Exhibit 2. Those written pleadings were the subject of a motion to amend at Exhibit 5, which this Court ultimately denied. In those written pleadings, the respondent conceded all four allegations in the Notice to Appear and the one charge under Section 237(a)(1)(A). The respondent conceded that he is not a citizen or national of the United States, that he is a native of Kenya and a citizen of Kenya and that his status was adjusted to that of a lawful permanent resident on November 14, 2008 under Section 245 of the Immigration and Nationality Act. Allegation number 4, the last allegation in the Notice to Appear provides that "you procured your admission, visa, adjustment, or other documentation or benefit by fraud or by willfully misrepresenting a material fact, to

wit: on November 2, 2011, you testified under oath that you married a United States citizen spouse in order to obtain your lawful permanent resident status."

The respondent filed those written pleadings on February 14, 2013 through his present counsel. As this Court has noted previously and has addressed in detail on the record, the respondent filed a motion to amend those pleadings on February 6, 2014. See Exhibit 5. The respondent essentially argued in his motion to amend pleadings through his present counsel, who is the same counsel that filed those written pleadings in the first place, that the respondent realized "he should not have fully conceded to the fourth allegation in the Notice to Appear." The respondent goes on to note that he admits that he procured his adjustment of status by willfully misrepresenting a material fact, but "not in the manner alleged in his Notice to Appear." The respondent's motion to amend pleadings is not accompanied by a declaration or an affidavit from the respondent. The Department of Homeland Security, in turn, opposed that motion to amend pleadings in Exhibit 5-A. The Government's opposition was submitted on May 13, 2014. The Government argues that the respondent "misrepresented a material fact in the exact manner alleged in the Notice to Appear." The Government then cites the exact language of allegation number 4. The Government correctly argues that the respondent's request to amend his pleadings should be denied as there is no basis in law or fact. As this Court noted above, the respondent has had at least two years to file a motion to suppress with this Court relating to his sworn statement. The respondent has not done so. Instead, the respondent chose to come to Court today and to testify that a United States Immigration officer essentially threatened him into making this statement. He does not deny that he made the statement set forth in allegation number 4. Instead, his testimony under oath today is that the Immigration officer told him that he could either leave with his passport

or leave in handcuffs. The Court finds that the respondent's failure to file a motion to suppress which within the four corners of that motion to suppress must set forth egregious conduct by the Immigration officer, which such a threat would be if found to be true, is fatal to the respondent's argument that he did not make the statement voluntarily as is set forth in allegation number 4.

In other words, this Court finds that the respondent is precluded from arguing through his counsel that his statement was not made voluntarily because the respondent has never filed a motion to suppress with this Court. The respondent was well aware that today was the day for his hearing and as the Court has noted, the respondent has had at least two years to file a motion to suppress.

As this Court noted during the removal proceedings, the First Circuit Court of Appeals has held that in their seminal decision regarding what is and what is not a material misrepresentation, that is, a willful misrepresentation of a material fact, that actions taken by an alien's attorney bind the respondent. The First Circuit Court of Appeals in its decision, Toribio-Chavez v. Holder, 611 F.3d 57 (1st Cir. 2010), cited another First Circuit case, KPS & Associates, Inc. v. Designs by FMC, Inc., 318 F.3d 1, n. 16 (1st Cir. 2003) (in this circuit, we have consistently turned a deaf ear to the plea that the sins of the attorney should not be visited upon the client). To the extent that the respondent argues that his attorney made an error by conceding allegation number 4 in this record, the Court finds that that is of no help to the respondent today.

Based upon the respondent's pleadings at Exhibit 2, this Court finds that removability has been established by evidence that is clear and convincing. As set forth in the Notice to Appear under Section 237(a)(1)(A) of the Immigration and Nationality Act in that at the time of the respondent's adjustment of status, he was within one or more classes of aliens inadmissible by law existing at such time, to wit: aliens who seek

to procure or have sought to procure, who have procured a visa, other documentation or admission into the United States or other benefit provided under the Act by fraud or by willfully misrepresenting a material fact under Section 212(a)(6)(C)(i) of the Act.

The respondent in those same written pleadings at Exhibit 2 seeks only one form of relief. He designates Kenya as the country for removal purposes and this Court will so designate Kenya as the country for removal purposes finding that removability has been sustained by evidence that is clear and convincing. The respondent does not seek adjustment of status. The respondent seeks only a waiver of removal pursuant to INA Section 237(a)(1)(H) of the Act. That section of law provides that the provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in Section 212(a)(6)(C)(i), whether willful or innocent, may in the discretion of the Attorney General be brief for any reason (other than an alien described in paragraph (4)(D)). Under certain circumstances, including that the respondent is a spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted to the United States for permanent residence and was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of Section 212(a) which were the direct result of that fraud or misrepresentation. There is a subparagraph relating to VAWA self-petitioners, but that is not applicable in this case. The statute concludes by noting that a waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

Therefore, it is important to the Court to note that there are two disparate

instances of fraud that the respondent is presenting to the Court today given his false testimony on the witness stand, which is this Court's finding. First, the respondent has engaged in a myriad of instances of fraud regarding his adjustment of status to that of a lawful permanent resident. The fraud that the respondent admits to engaging in spans the entire gamut of fraudulent conduct to obtain adjustment of status from creating fraudulent documents to making fraudulent statements about everything from the address where he lived to his children. The second disparate fraud present in this case is the fact that although the respondent conceded in his pleadings that he testified under oath that he married his United States citizen spouse in order to obtain his lawful permanent resident status and although the respondent actually made that statement in a sworn statement contained at Exhibit 4 beginning on page 167, the respondent now testifies under oath that although he made that sworn statement, he did so because he was threatened by the Immigration officer. This is the first time that the respondent has testified to that on the witness stand and more importantly, the respondent has never filed a motion to suppress this sworn statement with the Court. The respondent's failure to submit a motion to suppress is ultimately fatal to the respondent's arguments to the Court that he did not voluntarily make this statement under oath. And it is not only fatal to the respondent's credibility on the witness stand today, but leads to a finding that the respondent has presented false testimony on the witness stand today.

The sworn statement issue was taken on November 2, 2011 at the United States Citizenship and Immigration Service's Lawrence Field Office in Lawrence, Massachusetts before USCIS Officer Nancy Marshall. That sworn statement is set forth in the respondent's submission on pages 167-170. On the last page of that statement, next to the number 30 in parenthesis, the respondent is asked when you married [redacted] (his first wife), was it your intention to enter in a marital relationship with

R[redacted] or was this to help you obtain your lawful permanent residence? The respondent answers, "I married her to obtain my green card." The respondent's testimony on the witness stand today is that he made that statement, but that he did so under threat from Officer Marshall. The Court finds that the respondent's testimony that he made this statement under threat is fraudulent testimony and because it is fraudulent testimony before this Court, the respondent requires a 212(i) waiver, as the Government has argued. As the respondent's only form of relief that he seeks today is a 237(a)(1)(H) waiver, the Court finds that the respondent is not eligible for a 212(i) waiver and therefore, pretermits and denies the respondent's 237(a)(1)(H) waiver.

As the Court noted in its summary of decision, the respondent is ineligible for a 212(i) waiver of the Act for having presented false testimony to the Court because he is not an arriving alien seeking to waive a ground of inadmissibility or an alien in removal proceedings seeking to waive inadmissibility in conjunction with an application for adjustment of status. The respondent has never filed an application for adjustment of status with the Court. As noted above, the respondent has only filed written pleadings seeking a 237(a)(1)(H) waiver.

The Board of Immigration Appeals in a 2013 decision, Matter of Rivas, 26 I&N Dec. 130 (BIA 2013), found a virtually identical situation that a waiver of inadmissibility under Section 212(h) there was not available on a stand-alone basis to an alien in removal proceedings without a concurrently filed application for adjustment of status and a waiver may not be granted nunc pro tunc to avoid the requirement the alien must establish eligibility for adjustment. Although the Court recognizes that the facts of that case are distinct from this case as the 212(h) waiver was required for a conviction relating to the respondent's fraud, that case is still a precedent decision and stands for the premise that a 212 waiver, in this case, a 212(i) waiver, is not available

on a stand-alone basis to a respondent like the respondent in removal proceedings without a concurrently filed application for adjustment of status. That law remains valid today. There is no Board case or Circuit Court case that negatively treats Matter of Rivas. The respondent's arguments before the Board to the contrary that he was and should have been eligible for a 212(h) waiver were dismissed by the Board and this Court finds that that case, in conjunction with this Court's findings, required this Court to pretermit the respondent's application for a 237(a)(1)(H) waiver as the respondent is not eligible for that waiver. Specifically, the respondent is not seeking only to waive fraud or misrepresentation at the time of his adjustment of status, but he now requires a waiver for his false testimony on the witness stand today. That is, that the United States Immigration officer threatened him that he either leaves with his passport or he leaves in handcuffs, and by that threat, forced the respondent to initial his sworn statement four different times, sign his sworn statement one time below the words Subscribed and Sworn/Affirmed before me, Officer Nancy Marshall, at USCIS, Lawrence Field Office on November 2, 2011. This is not only incredible testimony, but this Court finds it is false testimony. The respondent is a bright, articulate individual. The respondent's version of events on the witness stand today is not only implausible, but given the sequence of events that have occurred in this case, including the respondent's concession to allegation number 4, is false testimony. For all of the reasons set forth above, this Court will therefore enter the following orders.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for a Section 237(a)(1)(H) waiver be and is hereby pretermitted and denied;

IT IS FURTHER ORDERED that the respondent be removed from the United States to Kenya based upon the one charge contained in the Notice to Appear at Exhibit 1.

Please see the next page for electronic signature

MATTHEW J. D'ANGELO
Immigration Judge