U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: NEWMAN, DANIEL B

A 029-682-240

Date of this notice: 3/16/2015

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:
Mullane, Hugh G.

Userteam: Docket

File: A029 682 240 – New York, NY Date: MAR 16 2015

In re: DANIEL B. NEWMAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joan M. Altamore, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

Sec. 212(a)(9)(B)(i)(II), I&N Act [8 U.S.C. § 1182(a)(9)(B)(i)(II)] - Previously unlawfully present for a year or more

Sec. 212(a)(9)(C)(i)(II), I&N Act [8 U.S.C. § 1182(a)(9)(C)(i)(II)] - Reentry without admission after being ordered removed

APPLICATION: Voluntary departure

The respondent, a native and citizen of Canada, appeals from the Immigration Judge's December 12, 2012, decision denying his application for voluntary departure.[1] Section 240B of the Immigration and Nationality Act, 8 U.S.C. § 1229c. The Department of Homeland Security has not filed a brief. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 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. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the Immigration Judge's decision denying the respondent's application for voluntary departure.[2] We agree with the Immigration Judge that the respondent is an arriving

[1] The respondent has not challenged the Immigration Judge's determination that he is removable as charged (I.J. at 4-5). We therefore deem the issue waived. *See Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal); *Matter of Edwards*, 20 I&N Dec. 191, 196-197 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived on appeal).

[2] The Immigration Judge's decision includes a scrivener's error. It reflects that the respondent applied for adjustment of status in 2011, but the application was actually filed in 2001 (I.J. at 2).

alien and thus ineligible for voluntary departure. Section 240B(a)(4) of the Act, 8 U.S.C. § 1229c(a)(4); *see also* 8 C.F.R. § 1001.1(q) (defining arriving alien).

The respondent was removed under section 235 of the Act and thereafter entered the United States without inspection. He married a United States citizen and applied for adjustment of status on that basis. While his application was pending, he traveled to the United States Virgin Islands ("USVI"). Upon his return, he was paroled into the United States. His application for adjustment of status was subsequently denied, and these removal proceedings commenced.

We are not persuaded by the respondent's contention on appeal that because he did not depart the United States when he traveled to the USVI, he is not an arriving alien (Respondent's Brief at 5). Section 212(d)(7) of the Act provides that certain criteria making aliens inadmissible to the United States also apply to aliens who leave the USVI and seek to enter the continental United States. Accordingly, such aliens are subject to inspection. *See* 8 C.F.R. § 235.5(a). When the respondent was inspected in USVI, he was paroled into the United States (I.J. at 3).[3] Under these circumstances, we agree with the Immigration Judge that the respondent is an arriving alien. *See* 8 C.F.R. § 1001.1(q) (an arriving alien remains an arriving alien even if paroled); *see also Matter of Oseiwusu*, 22 I&N Dec. 19, 19-20 (BIA 1998) ("Given the fact that the respondent was paroled into the United States, he falls within the definition of an 'arriving alien."). We therefore conclude that the Immigration Judge properly denied the respondent's application for voluntary departure. The appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

[3] The record is unclear regarding the basis on which the respondent was paroled into the United States, but it suggests that the respondent may have indicated that he had a pending application for a travel document (I.J. at 3).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A029-682-240 December 12, 2012

In the Matter of

DANIEL B. NEWMAN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired visa, re-entry permit, border crossing card, or other valid entry documents required by the Act, and a valid unexpired passport, or other suitable travel document or document of identity and nationality as required under the regulations issued by the Attorney General under Section 211(a) of the Act;

Section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, as amended, as an alien, other than an alien lawfully admitted for permanent residence, who has been unlawfully present in the United States for a period of one year or more, and who again seeks admission within ten years of the date of departure or removal from the United States;

Section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act, as amended, a an alien who has been ordered removed under Section 235(b)(1), Section 240, or any other provision of law, and who enters or attempts to re-enter the United States without being admitted.

APPLICATIONS: Voluntary departure.

ON BEHALF OF RESPONDENT: JOAN ALTAMORI, ESQUIRE

ON BEHALF OF DHS: DAVID SHTEINGART, ASSISTANT CHIEF COUNSEL

ORDER AND DECISION OF THE IMMIGRATION JUDGE

Procedural History and Facts of this Case

The respondent is a native of Canada and a citizen of Canada. On or about April 10, 1999, he applied for admission to the United States as a nonimmigrant visitor at Pembinn, North Dakota port of entry. He indicated that he wished to visit the United States for a period of ten days, and he was living and working in Canada. He also indicated he had never previously been refused admission into the United States, whereupon he was referred to secondary inspection. In secondary inspection, it was determined that he had not resided or worked in Canada for a period of seven years, and that he had previously been refused admission to the United States on at least two occasions.

On April 10, 1999, he was removed expeditiously from the United States pursuant to INA Section 235(b)(1) of the Immigration and Nationality Act.

Then, on May 16, 2011, he applied for adjustment of status with United States Citizenship and Immigration Services by filing Form I-485, application for adjustment of status, based on marriage to a United States citizen. On that application, he

indicated that he last entered the United States in April 1999 without inspection. At that time, he had accrued over one year of unlawful presence in the United States. While the application was still pending, he voluntarily departed the continental United States to visit St. Thomas in the United States Virgin Islands.

On June 7, 2005, he was paroled back into the United States to resume the application after stating that he had a pending application for a travel document. He was, at that time, an immigrant not in possession of a valid, unexpired immigrant re-entry permit, border crossing card identification card, or other valid entry documents required by the Immigration and Nationality Act. He was an individual who after acquiring over one year of unlawful presence in the United States was seeking admission within ten years of his removal from the United States in 1999.

The Court does not find that the respondent re-entered with a valid document, but, in fact, the respondent was paroled.

Exhibits

Exhibit No. 1 is the Notice to Appear dated September 14, 2010.

Exhibit No. 1A is the I-261 additional allegations filed on July 27, 2012.

Exhibit No. 2 is a hearing notice dated October 6, 2010 for a hearing December 15, 2012.

Exhibit No. 3 is a denied I-485.

Exhibit No. 4 is a decision by USCIS dated September 2, 2010 regarding the I-485.

Exhibit No. 5 is an I-213 regarding the respondent's history with also a printout regarding inspection and travel.

And those are the balance of the Exhibits in this case.

The Court did not hear testimony in this case, but simply makes the decision based on the briefing and arguments of counsel.

Legal Standards and Analysis of the Court

Respondent asserts the he is incorrectly charged as an arriving alien on the Notice to Appear dated September 14, 2010. See Exhibit No. 1.

The Department has maintained that the respondent is an arriving alien, and thus ineligible for the relief of voluntary departure under the prohibition in INA Section 240(b) and (c), INA Section 240B(a)(4) of the Act, which reads in pertinent part: "In the case of an alien who is arriving in the United States, and with respect to whom proceedings under Section 240 [8 U.S.C. Section 1229(a)] are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply."

The respondent, at previously proceedings, admitted allegations 1 through 9 and 12, and denied allegations 10, 11, 13 and 14. The respondent also conceded the charges of

removability under INA Section 212(a)(7)(A)(i)(I), and Section 212(a)(9)(B)(i)(II) and Section 212(a)(9)(C)(i)(II).

The issue in dispute is whether the respondent is correctly categorized as an arriving alien, thus precluding him from the sought after relief before the Court. This Court has determined that, based on the facts and circumstances of this case, the respondent having agreed that he was expeditiously removed from the United States on or about April 10, 1999, re-entered the United States without inspection some time during April of 1999, but otherwise contesting his eligibility for adjustment of status, voluntary departure and the like, and also contesting his description as an arriving alien, but admitting that he did travel to the United States Virgin Islands.

Upon presenting himself at the airport in the Virgin Islands for purpose of returning to the continental United States, the respondent was inspected as an applicant for admission pursuant to INA Sections 235(a)(1) and (3) of the INA, and as indicated in INA Section 235(a)(1), a respondent "who has been admitted, or who arrives in the United States" is treated as "an applicant for admission". INA Section 235(a)(1). A plain interpretation of the renders the respondent an applicant for admission at the time he presented himself for inspection in the Virgin Islands, irrespective of whether he was an alien not inspected or paroled, but living in the United States to date.

When the respondent returned to the continental United States and presented himself for inspection in the Virgin Islands, the respondent's posture was no different from an individual who is seeking admission to the United States for the first time, in transit from a foreign port, as the respondent was paroled based on the assumption and belief that the respondent had a pending I-131 application for travel document.

It is noted that the respondent indicated he did not, at the time of his return to the continental United States, have a travel document.

The Department has alleged that the respondent claimed he had a pending application for a travel document, and was thus paroled on this basis, and the Department relies on Exhibit No. 5 for this proposition. The Court does find that valid.

The Department went on to argue that the respondent is an arriving alien on the grounds that after voluntarily departing the continental United States, the respondent presented himself for inspection at the airport in St. Thomas, and sought return to the continental United States, and was paroled.

The Department argues that any alien seeking to travel to the continental United States from Guam, Puerto Rico, or the Virgin Islands, is subject to the same method and procedure in place for such temporary admission. See 8 C.F.R. Section 235.5 (describing pre-inspection in the United States territories and possessions, including the Virgin Islands). See also United

States v. Pollard, 326 F.3d 397 (3rd Cir. 2003) (upholding the stopping and questioning of travelers at a checkpoint in the Virgin Islands); Valenzuela-Solari v. Mukasey, 551 F.3d 53 (1st Cir. 2008) also discussing an individual who overstayed in the United States, and traveled to the Virgin Islands, and subsequently presented himself for inspection in the Virgin Islands to return to the continental United States.

As indicated in Pollard, "all persons -- citizen and noncitizens -- traveling from the Cyril E. King Airport in St. Thomas, Virgin Islands to the continental U.S. or Puerto Rico, pass through the checkpoint", Pollard at 402.

Upon passing through the designated checkpoint in the airport the respondent was inspected by an Immigration officer who paroled the respondent on the belief that he had a pending application for a travel document. By virtue of presenting himself for inspection with the intention of boarding a flight bound for the continental United States, the respondent was properly paroled, and is therefore no longer an alien present in the United States who has been admitted or paroled.

The regulations are clear, and provide that the term arriving alien means an applicant for admission coming, or attempting to come to the United States at a port of entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international or United States waters, and brought to the United States by any means, whether

or not to a designated port of entry, and regardless of the means of transport, an arriving alien remains such, even if paroled pursuant to Section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advanced parole, which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of INA Section 235(b)(1)(A)(i). See 8 C.F.R. Section 1001.1(q).

Accordingly, since this Court has determined that the respondent is properly in removal proceeding as charged, and as described as an arriving alien, the respondent is not eligible for voluntary departure pursuant to INA Section 240B.

The Court has carefully considered respondent's alternate arguments, and has considered the Seventh Circuit case of Gustavo Nunez-Moran v. Holder, Case number 11-2317 (7th. Cir. October 30, 2012) and does not find that case controlling on the issues before this Court, and although the individual in that case had previously sought adjustment of status, and was subject to expedited removal, the issues that are significant in this case, and are dispositive in this case are not answered by the Seventh Circuit's decision, which affirmed the Board's findings and denied the petition for review.

I also acknowledge the I-213 that was attached to respondent's brief, and I would like to add to the group of

Exhibits that I-213 as Exhibit No. 6 at this time.

This is the conclusion of the Court. The respondent is not eligible for voluntary departure on this record, and the respondent is removable as charged.

Having determined that the respondent is not eligible for the sought after relief of voluntary departure, the Court has to come to only one conclusion.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for voluntary departure is pretermitted and denied.

IT IS FURTHER ORDERED that the respondent is removed to Canada as charged.

Please see the next page for electronic signature
RANDA ZAGZOUG
Immigration Judge

//s//

Immigration Judge RANDA ZAGZOUG

ZagzougR on February 25, 2013 at 4:57 PM GMT