U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted]

A [redacted]

Date of this notice: 10/12/2011

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:
[redacted]

File: [redacted] Memphis, TN

Date: OCT 12 2011

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barry L. Frager, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Termination; adjustment of status

This case is before the Board pursuant to a May 5, 2009, order of the United States Court of Appeals for the Sixth Circuit. The record will be remanded.

Under 8 C.F.R. § 1003.1(d)(3), the Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

At issue in this matter is whether an alien who was admitted to the United States as a K-1 nonimmigrant fiancé may seek adjustment of status as a self-petitioner under the Violence Against Women Act ("VAWA"). *See* section 245(a) of the Immigration and Nationality Act, 8 U.S.C. *§ 1255(a).*

The respondent, a native and citizen of the Philippines, entered the United States on February 15, 2005, as a K-1 nonimmigrant fiancé with authorization to remain for 90 days until May 16, 2005. On February 22, 2005, the respondent married the United States citizen who petitioned for his K-1 visa.[1] The marriage ended in divorce on July 26, 2006. On August 29, 2006, United States Citizenship and Immigration Services approved the respondent's self-petition for an immigrant visa as a battered spouse of a United States citizen pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii). It appears that the abusive spouse was the same individual who petitioned for the respondent's K-1 visa.

[1] The record reflects that the respondent applied for adjustment of status on the basis of his marriage. However, the DHS later deemed the application abandoned and denied it.

[redacted]

Before the Immigration Judge, the respondent sought termination of proceedings and adjustment of status. On October 3, 2006, the Immigration Judge found that he lacked jurisdiction to consider the respondent's application for adjustment of status, denied the respondent's motion to terminate, and granted him the privilege of voluntary departure. On September 11, 2008, this Board dismissed the respondent's appeal.[2] On March 4, 2009, this Board denied the respondent's motion to reconsider. The Sixth Circuit remanded this matter to this Board to further consider whether the respondent is eligible to adjust status.

Upon further review of the record and consideration of the arguments presented, it appears that the respondent may be able to establish eligibility for adjustment of status before the Immigration Judge. The Immigration Judge has jurisdiction to consider the respondent's application for adjustment of status. *See* 8 C.F.R. § 1245.2(a)(1). Notwithstanding section 245(d) of the Act, an alien admitted as a K-1 may apply for adjustment of status on the basis of an approved VAWA self-petition so long as the marriage to the K-1 nonimmigrant visa petitioner was contracted in good faith within 90 days of the alien's admission in K-1 nonimmigrant status and the abuser is the K-1 nonimmigrant visa petitioner. *See Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children*, 61 Fed. Reg. 13061, 13070 (supplementary information) (March 26, 1996) (explaining that a VAWA self-petitioner who was admitted as a K-1 nonimmigrant is rendered ineligible for adjustment of status by section 245(d) of the Act "unless the abuser is also the citizen who had filed the finance(e) petition"); *see also Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 195 (BIA 2010) ("Although the Supplementary Information is not binding, we find it a useful tool in interpreting the regulations at issue."). Accordingly, if the respondent is able to establish that the abuser is the citizen who petitioned for his K-1 visa, he would not be subject to the provisions of section 245(d) of the Act.[3]

In light of the above, it appears that the respondent may be eligible to pursue adjustment of status. Accordingly, we will vacate our prior decisions in this matter and remand the record to the Immigration Judge for further proceedings.

ORDER: The Board's decisions dated September 11, 2008, and March 4, 2009, are vacated, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Ellen Pierbowitz
FOR THE BOARD

[2] The respondent filed a petition for review of our decision with the Sixth Circuit.

[3] Additionally, "the Service has determined that no useful purpose would be served by imposing the conditional residency requirements of section 216 of the Act[, 8 U.S.C. § 1186] on any self-petitioner. *Id.* Additionally, a VAWA self-petitioner is not subject to the affidavit of support requirements. *See* 8 C.F.R. § 213a.2(a)(2)(ii).