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Falls Church, Virginia 22041

File: A74 317 521 - Eloy

Date:

In re: OSVALDO LUNA RUBIO

MAY 24 2000

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Todd Bennett, Esquire

ON BEHALF OF SERVICE: John W. Davis
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] -
Alien smuggler

In a decision dated July 20, 1999, an Immigration Judge terminated the removal proceedings. The Immigration and Naturalization Service has appealed this decision. The appeal will be dismissed.

I. BACKGROUND

The respondent is a native and citizen of Mexico. He adjusted his status to that of a lawful permanent resident on or about February 11, 1999. *See* Tr. at 6. On April 5, 1999, the respondent was issued a Notice to Appear (Form I-862) which alleged that on April 3, 1999, he arrived at the Lukeville port of entry and applied for admission as returning resident alien. Further, he assisted Ofelia Guardado-Davila in illegally entering the United States. The respondent was charged as inadmissible under section 212(a)(6)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted or aided an alien to try and enter the United States in violation of law.

II. THE HEARING

At a hearing held on May 25, 1999, the respondent admitted his alienage. However, he denied that he was an applicant for admission or that he was removable as charged. The Immigration Judge continued the proceedings and informed the parties that all evidence should be filed by July 12, 1999. A hearing date was set for July 20, 1999.

At the next hearing, the Service argued that the respondent should be treated as an alien seeking admission as defined in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), because he assisted his sister-in-law in her attempt to illegally enter the United States. Specifically, the Service alleged that the respondent gave her his United States citizen wife's birth certificate to present at the border.

The Service's evidence consisted of a Record of Sworn Statement made by the respondent's sister-in-law Ofelia Guardado-Davila dated April 3, 1999. *See* Exh. 7. It also submitted an unsigned Record of Deportable Alien (Form I-213) dated April 3, 1999, and a signed Form I-213, dated April 5, 1999. *See* Exhs. 5 and 6.

The Service explained that Ofelia Guardado-Davila had been granted voluntary return to Mexico on April 3, 1999, and that the immigration inspector who conducted her interview and created the Form I-213 was on vacation. Therefore, neither would be available to testify. Without an objection from the respondent, the Service provided an electronic mail communication it sent on July 16, 1999, which informed the inspector that the respondent's hearing was on July 20, 1999. *See* Exh. 8. On July 17, 1999, the inspector replied that he would be on vacation at that time.

The respondent objected to the sworn statement and Forms I-213 because they contained hearsay and double hearsay, and no one was available for cross-examination. The Immigration Judge responded that he would admit the Service documents into evidence, and accord them the appropriate weight in his final decision.

The respondent was questioned by the Service about his family. The respondent stated that he was married to Mercedes Garcia, a United States citizen, and that his brother was Salvador. He initially refused to give the name of his sister-in-law under the Fifth Amendment privilege against self-incrimination. However, the Immigration Judge directed him to answer and he stated "Olveria." *See* Tr. at 18. The respondent also invoked the Fifth Amendment when asked about the events on April 3, 1999, but under the direction of the Immigration Judge, the respondent acknowledged that he arrived at the port of entry that day with his brother, "Ofelia," and his nephew. The respondent recalled being approached by the immigration inspector, but he denied being asked any questions about his passengers. *See* Tr. at 22.

The respondent denied knowing his sister-in-law's immigration status, and invoked the Fifth Amendment when asked if he tried to assist her in illegally entering the United States by giving her his wife's birth certificate. *See* Tr. at 25-26. The respondent's counsel declined to ask the respondent any questions.

III. THE DECISION OF THE IMMIGRATION JUDGE and THE APPEAL

The Immigration Judge admitted the Service's evidence, but then gave the documents "much less" weight because he found it unreasonable that neither Ms. Guardado nor the immigration inspector were available for cross-examination. He pointed out the Service waited until several

days before the hearing to contact the inspector and did not make a timely request for a continuance. The Immigration Judge considered that the respondent denied that he was asked questions about his passengers by the inspector at the border, and stated that he was unaware of his sister-in-law's immigration status. The Immigration Judge concluded that the respondent was not "subject to removal by clear and convincing evidence." He terminated the proceedings and ordered that the respondent be admitted as a lawful permanent resident.

The Service has appealed this decision. It asserts that the respondent is considered an arriving alien under the Act, and therefore he was properly charged under section 212 of the Act. Additionally, the Immigration Judge should have recognized the reliability of the sworn statement as a declaration against interest, and that the Form I-213 should have been treated as an inherently reliable document. It also points out that the respondent did not really rebut the contents of either document, and his sparse testimony on the central issues undermined his denial of the removal charge. The respondent has not replied to these arguments on appeal.¹

IV. THE DECISION OF THE BOARD

The respondent has denied that he is an "applicant for admission." On review, we find that the Service did not adequately prove this allegation. Therefore, any charge under section 212(a) of the Act cannot be sustained. The removal proceedings will remain terminated.

A. Section 101(a)(13)(C) of the Act - Burden of Proof

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a single unified removal proceeding in lieu of exclusion and deportation proceedings. *See generally Matter of Rosas*, Interim Decision 3384, at 6 (BIA 1999). The IIRIRA established two separate sets of grounds under which an alien may be removed. Section 212(a) of the Act applies to aliens who are "ineligible to be admitted to the United States." The grounds at section 237 of the Act apply to aliens who have been "admitted to the United States."

Section 101(a)(13)(A) of the Act defines the terms "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(13)(C) of the Act provides that:

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien --

¹ The respondent has requested that the Board strike the Service's appeal brief because it was not served on him until several days after it was timely filed with the Board. We decline to take this action as we can find no prejudice to the respondent from the slight delay in service. We also consider that the brief is largely identical to the lengthy Notice of Appeal filed by the Service.

- (i) has abandoned or relinquished that status,
- (ii) has been absent from the United States for a continuous period in excess of 180 days,
- (iii) has engaged in illegal activity after having departed the United States,
- (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,
- (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or
- (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

We have held that section 101(a)(13)(C) of the Act specifies a general rule that an alien lawfully admitted for permanent residence is not regarded as seeking admission, and then lists exceptions to the general rule. *See Matter of Collado*, 21 I&N Dec. 1061, at 1064 (BIA 1998). In the instant case, the issue is whether the respondent falls within one of these exceptions.

Section 101(a)(13) (C) of the Act does not expressly state whether the Service must prove that a returning resident is not an arriving alien, or whether the returning resident must prove that he or she does not fall within one of the exceptions.² We now address this question.

Where Congress' intent is not plainly expressed, or subject to ordinary meaning, we are to determine a reasonable interpretation of the language that effectuates Congress's intent. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Furthermore, in view of the harsh consequences of deportation, ambiguities are to be construed in favor of the alien. *Barber v. Gonzales*, 347 U.S. 637, 642 (1954); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Ali v. Reno*, 22 F.3d 442, 446 (2d Cir. 1994); *Matter of Hou*, 20 I&N Dec. 513, 520 (BIA 1992), *superseded on other grounds*, *Matter of Saint John*, 21 I&N Dec. 593 (BIA 1996); *Matter of Tiwari*, 19 I&N Dec. 875, 881 (BIA 1989).

²The Act does specifically address the burden of proof for an alien once he or she is classified as arriving or admitted. *See* sections 240(c)(2) and (3) of the Act (setting out the burden of proof for an alien in removal proceedings based on whether or not an alien is an "applicant for admission"); section 291 of the Act (specifying that an "applicant for admission" has the burden to establish that he or she is eligible for admission and not inadmissible). *See also* 8 C.F.R. §§ 1.1(q) and 240.8 (1999) (defining "arriving alien" as an "applicant for admission" and explaining the burden of proof for "deportable" and "arriving" aliens).

In consideration of these principles, we find that the Service should have the burden of coming forward with the evidence to establish that a returning resident falls under the exceptions listed in section 101(a)(13)(C). Indeed, we assume that if Congress wanted a returning resident to disprove that he or she was an applicant for admission, it would have specified this in the language of the statute. See *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 908 (BIA 1997). However, no such language was included in the recently revised section 101(a)(13)(C) of the Act.³ We also consider that section 101(a)(13)(C) of the Act essentially creates a presumption which benefits aliens once they establish their lawful permanent resident status. It therefore follows that the Service should have the burden to come forward with evidence to rebut the presumption.

We now address whether the Service has produced sufficient evidence to establish that the respondent should not be considered an "applicant for admission."

B. The Evidence of the Service

The Record of Sworn Statement by Ofelia Guardado-Davila was compiled by Inspector Ingham, and conducted in Spanish. There is no interpreter listed, and the initials "OGD" appear at the bottom of each page. In pertinent part it states:

Q: Did you arrive and apply for admission into the United States, today, 04/03/99, at the Lukeville, Arizona, Port of Entry?

A: Yes.

Q. Is this the document (showing the subject the Arizona birth certificate in the name of Mercedes Garcia) you presented to the inspector outside when you applied for admission?

A. Yes.

Q. Did you claim to be Mercedes Garcia?

A. Yes.

Q. Did you know that it is illegal to claim you are a United States citizen when you are not?

A. Yes.

Q. Where did you get this birth certificate?

A. Osvaldo.

³ We compare former section 101(a)(13) of the Act, which defined the term "entry" and expressly placed the burden of proof on the alien to show that he or she did not meet the definition. See also *Molina v. Sewell*, 983 F.2d 676, 678 (5th Cir. 1993).

Q. Who is Osvaldo Luna Rubio?
A. He is my husband's brother.

Q. Who is Mercedes Garcia?
A. Osvaldo's wife.

See Exh. 7.

The Service also provided the Form I-213, dated April 5, 1999, which is signed by Inspector Ingham.⁴ See Exh. 5. In the narrative portion, it states that the respondent presented himself for admission on April 3, 1999, with three passengers including Ofelia Guardado-Rubio, who displayed a United States birth certificate in the name of Mercedes Garcia. Further, the parties were referred to secondary inspection because Ms. Guardado appeared nervous, and during interrogation, Ms. Guardado stated that the respondent had provided her husband with the birth certificate. The inspector also uncovered that Ms. Guardado was the beneficiary of an approved visa petition filed by her husband, and he stated that she would be subject to expedited removal to Mexico.

C. Evaluation of Evidence

The respondent argues that the Service's evidence is unreliable due to its inclusion of hearsay and double hearsay. The Federal Rules of Evidence, including those addressing hearsay, do not govern immigration proceedings. See *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975); see also *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990). Rather, the test for the admissibility of evidence in immigration proceedings is whether the evidence is probative and whether its use is fundamentally fair so as to not deprive the alien of due process of law. *Id.*

The central piece of evidence in this case is the statement given by the respondent's sister-in-law which is recorded in the Record of Sworn Statement. It has been held that the government must make reasonable efforts in immigration proceedings to afford the alien a reasonable opportunity to confront witnesses against him or her. *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988); see also *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992) (internal citations omitted).

The Service explained that the respondent's sister returned to Mexico, which would certainly indicate that it could be impossible to locate her, and very unlikely that she would appear in any event. Under these circumstances, we find that it would have been futile for the Service to try and

⁴We note that we have not considered the contents of the unsigned Form I-213. See Exh. 6.

compel the witness to appear.⁵ Nonetheless, the Service still needed to establish the reliability of her statement, and we do not find that this was done.⁶

We take issue with the reliability of the sworn statement because the underlying interview was in Spanish, but no interpreter is listed. In the last question, the witness is asked whether she understood all of the questions given to her in Spanish, and she answers in the affirmative. This indicates that the immigration inspector conducted the interview in Spanish. However, this does not give us any suggestion of the quality of the officer's language abilities. Under these circumstances, since the inspector was not available for cross-examination, we find that the unanswered questions about the translation undermine the reliability of the contents of the interview. See *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989).

In this regard, we point out that the testimony of the immigration inspector could have cured some of the concerns about the reliability of the affidavit, namely verifying the quality of the interview and providing the respondent with some opportunity to ask questions about the interview. However, the Service did not provide the inspector for cross-examination, and we agree with the Immigration Judge that the Service's efforts to provide the witness were unreasonable. We point out that the Service contacted the inspector 4 days before the hearing, when it had been aware of the hearing date approximately 2 months earlier.

The Service asserts that the affidavit should be given full weight as a declaration against penal interest. We have held that an affidavit made by an unavailable declarant which is of sufficient reliability that it would be admissible in a federal judicial proceeding as a declaration against penal interest is entitled to full weight in an administrative deportation proceeding. See *Matter of Devera*, 16 I&N Dec. 266, 271 (BIA 1977). However, we do not find that this principle should be applied in the current case.

Section 803(b)(3) of the Federal Rules of Evidence defines the declaration against interest exception to the hearsay rule. It requires that the statement at issue "at the time of its making [be] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended the declarant to civil or criminal liability, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." However, the Record of Sworn Statement suggests that the witness was aware that she was receiving voluntary departure before her interview, and this

⁵We note that in the case of a witness located more than 100 miles away from the place of proceeding, the subpoena should provide for the witness to appear at the closest immigration court to respond to oral or written interrogatories. See 8 C.F.R. § 3.35(a)(4).

⁶On appeal, the Service questions why the respondent did not call his sister-in-law to testify. However, the burden is on the Service to produce a witness when it submits affidavit testimony. See *Saidane v. INS*, 129 F.3d 1063, 1065-66 (9th Cir. 1997); *Olabanji v. INS*, *supra*, at 1236, citing *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989).

would undermine her fear of criminal liability. *See* Exh. 7, p.6. Furthermore, unlike the affidavit in *Matter of DeVera, supra*, there is no corroborating evidence for the statements in the affidavit, and the respondent's claims contrary to the affidavit were not discounted as incredible by the Immigration Judge. *See Id.* at 271. These factors indicate that under *Matter of DeVera, supra*, the statement in question cannot be accorded enough weight to rebut the presumption under section 101(a)(13)(C) of the Act.

Based on the aforementioned reasoning, we find that the Record of Sworn Statement in question does not adequately prove that the respondent is an arriving alien. Another aspect to this case concerns the contents of the Form I-213. The Board has held that absent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, the document is inherently trustworthy and admissible as evidence to show alienage or deportability. *See Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). Further, it is not always necessary to have the inspector present to testify for the contents of the Form to be fully admissible. *Id.* Nonetheless, we do not find that the contents of the Form I-213 in this case are sufficient to establish that the respondent is an arriving alien.⁷

The key statements in the Form I-213 are derived from the statements made by the sister-in-law. If they are insufficient to independently stand, then they will not be upheld when essentially reproduced in a Form I-213 where the inspector is not available to testify. We also point out that unlike cases where the Form I-213 involves statements made by the alien facing removal, the key statements in the instant case were made outside of the presence of the respondent. This limits his ability to raise a challenge based on coercion during the interview or some other indicia of unreliability.

We therefore conclude that the Service did not provide enough evidence to rebut the presumption that the respondent is not an arriving alien within the meaning of the Act. The Service emphasizes that the respondent did not come forth with any persuasive evidence on the issue of whether he committed illegal or excludable activity while outside the country, and that he barely presented any testimony. However, the respondent did deny knowing his sister-in-law's immigration status, and this statement was not dismissed as incredible by the Immigration Judge. *See generally Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). Under these circumstances, we will not take an adverse inference from the respondent's selective silence which would rise to the level of curing the deficiencies in the Service's evidence. *Cf. Matter of Guevera*, 20 I&N Dec. 238 (BIA 1990; 1991).

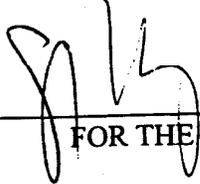
⁷We note that the Form I-213 was not authenticated or certified. *Cf. Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1994); *Bustos-Torres v. INS, supra*. However, the respondent did not object to admission of the document on this basis. *See* Tr. at 11. We therefore will not exclude it for this reason.

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V. CONCLUSION

The Service has not established that the respondent should be classified as an arriving alien under section 101(a)(13)(C) of the Act. Therefore, no charge of removability under section 212(a) of the Act could be sustained. The removal proceedings remain terminated, and the Service's appeal will be dismissed.

ORDER: The appeal is dismissed.



FOR THE BOARD