5 I. & N. Dec. 622 (BIA), Interim Decision 556, 1954 WL 7931

United States Department of Justice

Board of Immigration Appeals

IN THE MATTER OF M-----

In DEPORTATION Proceedings

E-057339

Decided by the Board January 14, 1954

****1 *622 Adjustment of status–Section 245 of the Immigration and Nationality Act–Filing of application terminates bona fide nonimmigrant status only–Deportation proceedings under section 242 of the Immigration and Nationality Act need not be adjourned solely to afford the alien a hearing on his application for adjustment of status.**

(1) Although the filing of an application for adjustment of status under section 245 of the Immigration and Nationality Act terminates a bona fide nonimmigrant status enjoyed up to that time, it does not operate to remove a preexisting ground of deportability based on previous failure to comply with the conditions of status.

(2) There is no provision of law or regulation that gives an alien an absolute right to an adjournment of a deportation hearing in order to have his application for adjustment of status disposed of.

CHARGE:
Warrant: Immigration and Nationality Act–seaman–remained longer.

BEFORE THE BOARD

Discussion: This is an appeal from an order of the special inquiry officer finding the respondent deportable but granting him the privilege of voluntary departure in lieu of deportation.

The record relates to a 26-year-old married male, a native and citizen of the Philippine Republic whose last entry into the United States occurred at Honolulu, T. H., on November 27, 1952, at which time he was admitted as a seaman under section 3 (5) of the act of 1924 and the regulations promulgated thereunder for the period of time his vessel remained in port, not exceeding 29 days. The record shows that he never departed from the United States since such arrival and that he accepted employment ashore, having worked for a period of 10 hours as a longshoreman in San Francisco about May 1, 1953. The special inquiry officer has found the respondent deportable on the warrant charge.

Counsel urges two grounds of error, both related to the fact that the respondent filed an application for adjustment of status to that of an immigrant under section 245 of the Immigration and Nationality Act. It appears that on April 29, 1953, the respondent filed with the Immigration and Naturalization Service an application for adjustment ***623** of status to that of a nonquota immigrant as the spouse of a United States citizen. On May 1, 1953, he received a letter advising him to appear for a hearing on said application on May 11, 1953. In the meantime, the warrant hearing came up on May 4, 1953, at which time counsel objected to proceeding with it pending the disposition of the application for adjustment of status, but the objection was overruled by the special inquiry officer.

Counsel contends that upon the filing of the application under section 245, the alien's status as a nonimmigrant was terminated and that he no longer could be found deportable thereafter as a nonimmigrant who had failed to comply with the conditions of his status. We find this position to be clearly untenable. The pertinent portion of section 245 (a) of the Immigration and Nationality Act provides as follows:

****2** The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant *and who is continuing to maintain that status* may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants) to that of an alien lawfully admitted for permanent residence as a quota immigrant or as a nonquota immigrant under section 101 (a) (27) (A), if (1) the alien makes application for adjustment, (2) the alien is admissible to the United States for permanent residence under this act, (3) a quota or nonquota immigrant visa was immediately available to

him at the time of his application for adjustment, (4) a quota or nonquota immigrant visa is immediately available to him at the time his application is approved, and (5) if claiming a nonquota status under section 101 (a) (27) (A) he has been in the United States for at least one year prior to acquiring that status. * * * Any alien who shall file an application for adjustment of his status under this section shall thereby terminate his nonimmigrant status. [Emphasis supplied.]

A perusal of this section indicates that it embraces those persons who were lawfully admitted to the United States as nonimmigrants and have continued to maintain that status until the very moment that the application for adjustment of status is filed. If an alien is not maintaining such nonimmigrant status, then he does not qualify for relief under this section, and is amenable to all the applicable immigration laws pertaining to his status. If he has maintained his status, then the filing of the application under section 245 (a) terminates his nonimmigrant status, and if his application is denied, he becomes amenable to the appropriate laws and regulations to enforce his departure. (See *8 C. F. R. 245.17* (*e*).)

In the instant case the respondent was admitted as a seaman under the provisions of section 3 (5) of the act of 1924 and the applicable regulations promulgated thereunder. Under 8 C. F. R. 120.21, one of these regulations, seamen were admitted for the period of time their vessels remained in the United States, not exceeding 29 days. One of the conditions of the respondent's status, therefore, was that he ***624** depart from the United States at the expiration of the period of 29 days, the maximum for which he was admitted. Upon his failure to so depart, he became subject to deportation under section 241 (a) (9) of the Immigration and Nationality Act as a nonimmigrant who had failed to comply with the conditions of his status. The fact that he was unable to obtain a ship to effect departure within the period of time for which he was admitted did not render his overstay legal. Though pertinent to the issue of discretionary relief, the reason for his overstay was immaterial to the issue of deportability. When the warrant of arrest was issued on February 2, 1953, he was already subject to deportation. The fact that he subsequently filed an application for adjustment of status under section 245 (a) of the Immigration and Nationality Act did not alter this liability. Though such filing might terminate a bona fide nonimmigrant status enjoyed up to that time, it could not operate to remove a preexisting ground of deportability, based on his previous failure to comply with the conditions of status. We conclude therefore that the special inquiry officer properly found the respondent deportable.

****3** Counsel further contends that, in any event, the respondent was entitled as a matter of right to a hearing on his application for adjustment of status, and that the deportation hearing should have been deferred until the disposition of such application. We find no provision of law or regulation that gives an alien an absolute right to an adjournment of a deportation hearing in order to have his application for adjustment of status disposed of. Under 8 C. F. R. 245, the application for adjustment of status is an independent proceeding conducted by an immigration officer other than a special inquiry officer, and over which this Board has no jurisdiction. To hold that an alien by filing such an application, no matter how frivolous or unfounded his claim to relief may be, may automatically stay a deportation proceeding already pending would be to read into the law a provision which does not exist. It is true that under 8 C. F. R. 242.53 (i), the special inquiry officer may at the commencement of the hearing, grant a reasonable adjournment for good cause shown. But, where as here the application for adjustment of status was filed after the alien had clearly overstayed his leave as a seaman and rendered himself subject to deportation, the special inquiry officer was justified in proceeding with the deportation hearing.

Upon due consideration of the entire record we find no error in the order of the special inquiry officer, and will therefore dismiss the appeal.

Order: It is ordered that the appeal be dismissed.

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