U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

June 6, 2011

Russell Abrutyn, Esq.
Marshal E. Hyman & Associates
3250 West Big Beaver, Suite 529
Troy, MI 48084

RE: Freedom of Information Act Request Regarding Unpublished Decision in *Matter of Wood*

Dear Mr. Abrutyn:

This letter is in response to your Freedom of Information Act (FOIA) request, which the Executive Office for Immigration Review (EOIR) received on April 18, 2011. In your FOIA request, you seek a copy of the Board of Immigration Appeal's (Board) unpublished decision in *Matter of Wood.*

We note that you did not provide authorization for release of this information, such as a completed form DOJ-361, signed by the named individual (see attached), or a completed form EOIR-28. Therefore, EOIR considers you a third-party requester of records. When a third-party requester seeks information that is exempt from disclosure, in the absence of an original signature of the subject authorizing release, EOIR only releases a redacted version of the final agency decision.

Enclosed is a redacted copy of the Board's decision. Please be advised that the FOIA Service Center has redacted information pursuant to 5 U.S.C. § 552(b)(6) of the FOIA to avoid a clearly unwarranted invasion of personal privacy.

If you are not satisfied with this decision, you may file an appeal with the Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., N.W., Suite 11050, Washington, D.C. 20530. OIP must receive your appeal within 60 days of the date of this letter. The procedures for appeal are stated at 28 C.F.R. § 16.9.

Sincerely,

Suleana Lawhorn-Sama
Freedom of Information Specialist

Enclosures
Control Number: 2011-11213

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U.S. Department of Justice
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Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] - Detroit Date:

In re: [redacted]

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: David H. Paruch, Esquire
Clark, Klein & Beaumont
1600 First Federal Building
Detroit, Michigan 48226-1962

ON BEHALF OF SERVICE: Michael B. Dobson
General Attorney

EXCLUDABLE: Sec. 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)] - No valid immigrant visa

Sec. 212(a)(14), I&N Act [8 U.S.C. § 1182(a)(14)] - No valid labor certification

APPLICATION: Admission to the United States as returning lawful permanent resident

The Immigration and Naturalization Service (Service) appeals the decision, dated April 26, 1990, of the immigration judge who concluded that the applicant had not abandoned his lawful permanent resident status and ordered his admission. The appeal will be dismissed.

The applicant, a 28-year-old native and citizen of Canada, entered the United States in 1979. In 1981, the applicant adjusted his status to a lawful permanent resident, derived from his father's adjustment of status. The applicant physically resided with his family in Prospect, Kentucky from 1979 to September 1988. The applicant attended high school and began his college education in Kentucky.

In September 1988, the applicant traveled to Canada to begin a new manufacturing branch for the company in which his father was the president. On January 28, 1989, the applicant sought admission to the United States. When directed by the Service, he relinquished his Alien Registration Receipt Card and signed an Abandonment of Lawful Permanent Resident Status (Form I-407). The applicant also signed an affidavit prepared by the Service. Apparently, the Service issued the applicant a nonimmigrant visitor visa and permitted the applicant to enter the United States at that time.

[redacted]

The applicant made subsequent entries into the United States after the incident on January 28, 1989. It was not until September 15, 1989, however, until the Service issued the applicant a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge (Form I-122). At the exclusion hearing conducted on April 26, 1990, the immigration judge determined that the applicant had a colorable claim to lawful permanent resident status. Since he had a colorable claim, the immigration judge noted that the burden of proof rested with the government to show by clear, unequivocal, and convincing evidence that the applicant was not admissible. The immigration judge found that the Service did not meet the burden, reasoning that the applicant's affidavit was not sufficiently probative to conclude that the applicant had abandoned his residence in the United States.

On appeal the Service contends that the immigration judge erred in his conclusion that the applicant had a colorable claim to lawful permanent resident status. Furthermore, the Service asserts that if the applicant did show that he had a colorable claim as a lawful permanent resident, it met the burden of proof by clear, unequivocal, and convincing evidence that the applicant had abandoned his status. The Service suggests that the applicant's affidavit and Form 407 are clear manifestations of the applicant's abandonment of his lawful permanent residence in the United States. The Service also argued in its appellate brief that the applicant's testimony lacked credibility and his story of the sequence of events on January 28, 1989, was "preposterous." Service Brief at 11. We disagree and will dismiss the appeal.

Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(20), requires the exclusion of immigrants seeking admission to the United States if they do not possess a valid immigrant visa, reentry permit, or other valid entry document. Section 211(b) of the Act, 8 U.S.C. § 1181, however, permits the Attorney General to waive those documentary requirements and, hence, the section 212(a)(20) ground of excludability, for an alien who is a returning resident immigrant. A returning resident immigrant is "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." Section 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A); Santos v. INS, 421 F.2d 1303, 1305 (9th Cir. 1970).

At the outset, it is important to note that where an applicant for admission to the United States has a colorable claim to returning resident status, the burden is on the Service to show by clear, unequivocal, and convincing evidence that the applicant should be deprived of his lawful permanent resident status. Angeles v. District Director, INS, 729 F. Supp. 479 (D.Md. 1990); Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

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The first issue presented is whether the applicant has a colorable claim to returning resident status. The record reflects that the applicant was granted lawful permanent resident status in 1981. The applicant maintained that status through high school and then through his first years of college. In September 1988 he departed the United States as a lawful permanent resident bound for Canada and asserts his permanent resident status to the present proceedings.

The Service, however, contends that the applicant lost all claim to his lawful permanent resident status when the applicant executed an abandonment form, signed an affidavit, and surrendered his Alien Registration Receipt Card. While the applicant conceded that he signed the forms and surrendered his Alien Registration Receipt Card, he offered that he had no other choice. The applicant testified that when asked by the Service where his residence was located, he told the official that he resided with his parents in Kentucky (Tr. at 14). The applicant added that the officer told him that a residence with his parents did not "count" as a residence in the United States (Tr. at 14-15). 1/ Since the applicant did not have any other residence in the United States, and since he had been working in Canada, he, himself was not certain of his status and followed the instructions of the Service officer. He surrendered his Alien Registration Receipt Card as demanded by the officer.

The Service officer who interviewed the applicant testified that the applicant had been sent to a secondary inspection area because he had told an initial inspector that he had been a resident alien of the United States (Tr. at 36-37). The Service officer then asked the applicant for his resident alien card, and according to the officer's testimony, the applicant stated that he did not have a card (Tr. at 37). The Service officer indicated that he found the applicant's card in the applicant's wallet. When he asked the applicant why he did not present himself as a returning resident, the officer stated that the applicant appeared "dumb-founded" (Tr. at 37). The Service officer then added that he asked where the applicant lived and the applicant replied that "he lived in Canada at the time." Tr. at 37 (emphasis added). The applicant also

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1/ The applicant's testimony makes sense in light of the Service officer's testimony that he was under the mistaken impression that the applicant's father was living in Canada (Tr. at 42). If the Service assumed that the applicant was living in Canada with his father, this may have been the basis for the statement that the applicant could not designate his parent's residence in the United States as his own.

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added to the Service officer that "he was opening a business with his father in Canada, and he was just coming to the U.S. just to visit at the time." Tr. at 37 (emphasis added). After that inquiry, the Service officer placed the applicant under oath and "took a short affidavit from him, and took his green card from him." Tr. at 37.

While the Service argues that the applicant's testimony is not credible, we do not find it inconsistent with the Service officer's testimony. It is very plausible that the applicant told the officer that he was "visiting" his family in Kentucky. After all, it is uncontroverted that the applicant did plan to return to Canada after seeing his family and discussing business operations with his father. Originally, the respondent intended to go to Canada for one job, but the company received two others, requiring him to remain there longer (Tr. at 13). He returned in January 1989, to seek his father's assistance and visit with his family. The applicant's desire to "visit" his family and his statement that he was living in Canada "at the time," are not, in the absence of other evidence, conclusive evidence of abandonment.

Under the present circumstances, the applicant's relinquishment of his Alien Registration Receipt Card at the Service officer's order and subsequent signing of the abandonment form and affidavit do not prevent the applicant from showing a colorable claim to lawful permanent resident status. As indicated by the immigration judge, the affidavit is entitled to limited weight. It was prepared by the Service officer based upon his recollection and word selection (Tr. at 38, 40). It was very short and cursory, and the Service officer acknowledged that the word choice was his own. In fact, the officer conceded that the applicant never told him that he "freely and voluntarily" surrendered his Alien Registration Receipt Card; rather he just "typed it in." Tr. at 41. Additionally, the officer indicated that he was under the false assumption that the applicant's father was residing in Canada and not in the United States (Tr. at 42). These errors and misinterpretations warranted the immigration judge giving less weight to the affidavit. 2/ Viewing the complete circumstances

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2/ The immigration judge stated that "an affidavit is something that is easily misconstrued or words changed, and the intent of the maker of the affidavit is not always that of the person who signs it." We note that the immigration judge's comment is clearly apparent in the present case when the Service elected to take a verbatim, sworn statement from the applicant on September 25, 1989. Not only does the sworn statement reflect the applicant's words, but it also indicates that the applicant had an opportunity to correct errors and it includes greater detail.

surrounding the January 28, 1989, admission, we conclude that the applicant did have a colorable claim to lawful permanent resident status during his attempted entry on September 25, 1989.

The burden now turns to the Service to show by clear, unequivocal, and convincing evidence that the applicant should be deprived of his lawful permanent resident status. Angeles v. District Director, INS, supra; Matter of Huang, supra. In so doing, we note that an applicant's desire to retain his status, without more, is not sufficient to retain that status. Angeles v. District Director, INS, supra; Matter of Huang, supra; Matter of Kane, 15 I&N Dec. 258 (BIA 1975). A temporary visit, however, cannot be defined in terms of elapsed time alone. United States ex rel. Polymeris v. Trudell, 49 F.2d 730 (2d Cir. 1931), aff'd, 284 U.S. 279 (1932). Rather, the intention of the alien, when it can be ascertained, will control. Id.; Matter of Kane, supra. The factors bearing on a determination of whether an alien is returning from a temporary visit abroad include the duration of the alien's absence from the United States; the location of the alien's family ties, property holdings, and job; and the intention of the alien with respect to both the location of his actual home; and the anticipated length of his excursion. See Matter of Huang, supra; Matter of Muller, 16 I&N Dec. 637 (BIA 1978); Matter of Quijencio, 15 I&N Dec. 95 (BIA 1974). The finding that an alien abandoned his status as a permanent resident during the visit abroad is equivalent to a finding that the alien's visit was not temporary. See Matter of Muller, supra, at 639. Based upon the facts of the present case, we conclude that the immigration judge did not err and the Service has failed to meet the burden of showing that the applicant should be deprived of his lawful permanent resident status.

The record reflects that the applicant departed in September 1988 to open an office for the corporation in which his father is the president. The amount of time given by the applicant and his father varied. He indicated that he rented an apartment in Canada to avoid the high costs of a hotel room. It is clear, however, that the applicant left many of his belongings in his parent's home. The applicant's mother testified that the applicant's room is still in her home and that the applicant did not take many of his items with him when he left for Canada (Tr. at 29-30).

The record indicates that the applicant desired his parent's home to be his permanent abode. We emphasize, however, that "unrelinquished lawful permanent residence," as used in 8 C.F.R. § 211.1(b) (1991), can have reference to something less than a permanent dwelling place in the United States. Matter of Huang, supra; see also Saxbe v. Bustos, 419 U.S. 65 (1974); Matter of Kane, supra. Consequently, even if we were to assume that the

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applicant no longer resided with his family, the applicant's lack of an actual dwelling place in this country is not, in and of itself, determinative in ascertaining whether he is returning from a temporary absence abroad. See Matter of Huang, supra; Matter of Kane, supra; Matter of Guiot, 14 I&N Dec. 393 (D.D. 1973).

Rather, we view the applicant's intent and the specific factors surrounding his return to Canada. See Matter of Huang, supra. The record reflects that the applicant intended to return to the United States after the first project, but received two others. These projects required him to remain in Canada longer than anticipated, yet he returned to the United States a couple of times between September 1988 and January 1989, and a couple more times between January 1989 and the date of the exclusion hearing. He maintained a bank account in the United States. Also, he manifested a continuous intention to return to the United States and continue his collegiate studies. During one of his return trips to the United States, he returned to the college that he had been attending and copied his computer files to better preserve them for when he continued his studies (Tr. at 18-19). The applicant testified that his computer project was necessary to complete his degree and would be only useful on the computer located at the college he had been attending (Tr. at 19). As indicated, he maintained a room in his parent's home and returned there after completing his work in Canada.

In an effort to meet its burden, the Service not only emphasized the forms executed by the applicant, but emphasized the stated times in which the applicant expected to be outside of the United States as indicative of his intent to abandon his United States residence. We note that each time either the applicant or his father stated the amount of time the applicant expected to be outside of this country, each prefaced their time frame as an estimate. Given the short periods of time the applicant remained outside the United States, the testimony of the applicant and his father do not evidence an intent to abandon; rather it indicates the real problems associated with the establishment of a company in Canada.

In sum, the immigration judge properly concluded that the Service did not show by clear, unequivocal, and convincing evidence that the respondent in his short departures to Canada ever intended to abandon his lawful permanent resident status. Accordingly, the Service appeal will be dismissed.

ORDER: The appeal is dismissed.

David L. Mikhollan
FOR THE BOARD

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