Matter of Shlomo BADOR, Respondent

Decided October 6, 2022

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) A fraud waiver under section 237(a)(1)(H) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(H) (2018), does not waive a respondent's removability under section 237(a)(1)(D)(i) of the INA, 8 U.S.C. § 1227(a)(1)(D)(i), where conditional permanent residence was terminated for failure to file a joint petition, a reason separate and independent from fraud. *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995), *aff'd, Gawaran v. INS*, 91 F.3d 1332 (9th Cir. 1996), reaffirmed.

(2) A section 237(a)(1)(H) fraud waiver cannot be used in place of, or in conjunction with, a "good faith" waiver under section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B) (2018), to waive the requirement to file a joint petition to remove conditions on residence under section 216 of the INA, 8 U.S.C. § 1186a.

FOR THE RESPONDENT: Kai William De Graaf, Esquire, New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY: David Schteingart, Assistant Chief Counsel

BEFORE: Board Panel: WILSON, GOODWIN, and GORMAN, Appellate Immigration Judges.

GOODWIN, Appellate Immigration Judge:

In a decision dated December 6, 2018, an Immigration Judge denied the respondent's request to waive the requirement to file a joint petition to remove the conditions on his permanent residence under section 216 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1186a (2018).[1] The Immigration Judge also deemed the respondent ineligible for a waiver of his removability pursuant to section 237(a)(1)(H) of the INA, 8 U.S.C. § 1227(a)(1)(H) (2018), and ordered him removed from the United States.[2]

[1] The Immigration Judge reviewed de novo the decision of the United States Citizenship and Immigration Services denying the respondent's request to waive the joint filing requirement under section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B). *See* 8 C.F.R. § 1216.5(e)(2), (f) (2021).

[2] The respondent does not meaningfully challenge the Immigration Judge's decisions to pretermit his application for cancellation of removal pursuant to section 240A(a) of the INA, 8 U.S.C. § 1229b(a) (2018), and deny his application for cancellation of removal pursuant to section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). We deem any

The respondent has appealed from this decision. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Israel who was accorded conditional permanent resident status on April 2, 2009, based on his marriage to a United States citizen. On March 21, 2011, the respondent and his former spouse jointly filed a Form I-751, Petition to Remove Conditions on Residence, with the United States Citizenship and Immigration Services ("USCIS"). His spouse later withdrew her support from this joint petition. USCIS deemed the jointly-filed petition withdrawn on July 17, 2014.[3]

On November 3, 2014, the respondent filed a second Form I-751 with USCIS based upon this same marriage and sought to waive the joint petition requirement because, he argued, his marriage was entered into in "good faith" pursuant to section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B). 8 C.F.R. §§ 216.5(a)(1)(ii), 1216.5(a)(1)(ii) (2021). On July 12, 2016, after finding the respondent's marriage was not entered into in good faith, USCIS denied his request to waive the joint filing requirement and his second petition, terminating the respondent's conditional permanent residence under section 216.

The respondent was placed in removal proceedings and conceded he was removable as charged under section 237(a)(1)(D)(i) of the INA, 8 U.S.C. § 1227(a)(1)(D)(i), for being a conditional permanent resident whose status has been terminated. Initially, the respondent sought review of USCIS's decision to deny his request for a "good faith" waiver of the joint filing requirement before the Immigration Judge, again contending that his marriage was entered into in good faith. On direct examination, he testified at length and in significant detail, asserting the bona fides of his marriage. He continued to assert that his marriage was valid on cross-examination, even after he was provided with evidence of a USCIS field investigation showing that his marriage was fraudulent. The respondent then withdrew his request that the Immigration Judge review USCIS's denial of the "good faith" waiver and instead requested a fraud waiver under section 237(a)(1)(H) of the INA, 8 U.S.C. § 1227(a)(1)(H).

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arguments regarding these issues to be waived. *See Matter of P-B-B-*, 28 I&N Dec. 43, 44 n.1 (BIA 2020) (stating that arguments not raised on appeal are deemed waived).

[3] USCIS's decision states that the joint petition was "withdrawn" and "denied." Once a joint petitioner's spouse withdraws from the petition it is, by operation of law, withdrawn from consideration "as if never filed." *Matter of Mendes*, 20 I&N Dec. 833, 838–39 (BIA 1994) (stating that written withdrawal of the joint petition by the petitioner automatically withdraws the petition from consideration).

At a continued hearing, the respondent stated that he would not call his former spouse as a witness and admitted that the marriage was not bona fide but was entered into to "fix [his] green card." The respondent then reinstated his request that the Immigration Judge review the denial of a "good faith" waiver of the joint filing requirement and sought a section 237(a)(1)(H) fraud waiver in conjunction with a "good faith" waiver.

The Immigration Judge denied both waivers. She found the fraud waiver could not waive the respondent's removability under section 237(a)(1)(D)(i) and only waived a charge of removability under section 237(a)(1)(A). She then denied the respondent's request for a "good faith" waiver of the joint-filing requirement because the respondent did not establish his marriage was entered into in "good faith." This appeal followed.

II. ANALYSIS

There are two main interrelated issues in this case. The first is whether the respondent may use a waiver under section 237(a)(1)(H) to waive his removability under section 237(a)(1)(D)(i), which is based on the termination of his conditional permanent resident status for failure to file a joint petition. The second issue is whether the respondent may use the 237(a)(1)(H) waiver in place of, or in conjunction with, a "good faith" waiver under section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B), to waive the joint petition requirement under section 216 of the INA, 8 U.S.C. § 1186a. We review these legal questions de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2021).

A. Legal Background

Section 237(a)(1)(H) provides, in relevant part, as follows:

> The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien . . . who—
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> (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
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> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.
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> . . . .

> A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

Generally, this provision authorizes a waiver of removability under section 237(a)(1)(A) of the INA, 8 U.S.C. § 1227(a)(1)(A), based on charges of inadmissibility at the time of admission under section 212(a)(6)(C)(i) of the INA, 8 U.S.C. § 1182(a)(6)(C)(i) (2018), for fraud or willful misrepresentation of a material fact, or section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I), for lack of valid immigration documents. *Matter of Fu*, 23 I&N Dec. 985, 988 (BIA 2006).

In 1986, Congress added section 216 to the INA through section 2 of the Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537, 3537. This law was aimed at uncovering and deterring marriage fraud in immigration proceedings, while protecting law-abiding individuals seeking status through valid marriages. H.R. Rep. No. 99-906, at 6–7 (1986); 132 Cong. Rec. 33,802–03 (Oct. 18, 1986); 132 Cong. Rec. 27,015–17 (Sept. 29, 1986).

To provide immigration authorities time to examine the bona fides of a marriage more fully, section 216 of the INA, 8 U.S.C. § 1186a, created a 2-year conditional permanent resident status for those who sought to obtain permanent resident status based upon marriage to a United States citizen. *See Matter of Munroe*, 26 I&N Dec. 428, 430 (BIA 2014). The statute provided the benefits of permanent resident status during those 2 years. After this period, the United States citizen and his or her spouse had the burden to prove that their marriage was bona fide and entered into in good faith and were required to file a joint petition to remove the conditions on residence. INA § 216(c)(1)(A), 8 U.S.C. § 1186a(c)(1)(A); 8 C.F.R. §§ 216.4(a)(1), 1216.4(a)(1) (2021) (providing that the citizen spouse and the conditional permanent resident must, within the 90-day period immediately preceding the second anniversary of the date the noncitizen obtained conditional permanent residence, file a joint petition to lift the conditions on residence). If they are able to meet this burden, the conditions on residency are lifted. INA § 216(c)(3)(B), 8 U.S.C. § 1186a(c)(3)(B). However, should officials find that the marriage is not bona fide and was entered into for the purpose of circumventing the immigration laws, section 216 permits the Government to terminate the conditional permanent resident status and initiate removal proceedings under section 240 of the INA, 8 U.S.C. § 1229a (2018). INA § 216(c)(3)(C), 8 U.S.C. § 1186a(c)(3)(C).

Recognizing that some marriages may be entered into in good faith but fail prior to the end of the 2-year conditional residency period for reasons other than fraud, Congress provided a discretionary waiver of the joint petition requirement under section 216(c)(4) of the INA,

8 U.S.C. § 1186a(c)(4). To qualify for the waiver, an applicant must establish that he or she was not at fault for failing to meet the filing requirement and that: extreme hardship would result if he or she was removed; the marriage was entered into in good faith, but had been terminated; or the marriage was entered in good faith, but the applicant was subjected to battery or extreme cruelty by either the petitioning spouse or intended spouse. INA § 216(c)(4)(A)–(D), 8 U.S.C. § 1186a(c)(4)(A)–(D); *see also* 8 C.F.R. §§ 216.5(a)(1), 1216.5(a)(1). The applicant for a waiver has the burden of establishing that a waiver of the joint filing requirement is warranted. *See* INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4) (stating that the individual requesting the waiver has the burden of proof to demonstrate his or her eligibility for the waiver).

For purposes of a "good faith" waiver under section 216(c)(4)(B), a marriage is considered to have been entered into in good faith if the parties intended to establish a life together at the time they were married. *See, e.g.*, *Matter of Laureano*, 19 I&N Dec. 1, 2–3 (BIA 1983); *cf. Matter of McKee*, 17 I&N Dec. 332, 333 (BIA 1980) (concluding that a fraudulent marriage is one that is entered into to circumvent the immigration laws and solely for the purposes of obtaining immigration benefits). The "conduct of the parties after marriage is relevant to their intent at the time of the marriage." *Matter of Laureano*, 19 I&N Dec. at 3. To determine whether an applicant for this waiver entered into a marriage in good faith, an adjudicator must consider evidence "relating to the amount of commitment by both parties to the marital relationship." 8 C.F.R. §§ 216.5(e)(2), 1216.5(e)(2).

If a request for a waiver of the joint petition requirement is denied and conditional status is terminated, the respondent is removable under section 237(a)(1)(D)(i), and he or she may seek review of the specific waiver USCIS denied before an Immigration Judge in removal proceedings. *See* INA § 216(c)(3)(D), 8 U.S.C. § 1186a(c)(3)(D); *Matter of Lemhammad*, 20 I&N Dec. 316, 322 (BIA 1991); 8 C.F.R. §§ 216.5(f), 1216.5(f); *see also Matter of Anderson*, 20 I&N Dec. 888, 892 (BIA 1994) (stating that an Immigration Judge only has jurisdiction to review the denial of the specific waiver that was requested). In removal proceedings, the waiver applicant bears the burden of demonstrating his or her eligibility for a waiver of the joint filing requirement. *See Matter of Mendes*, 20 I&N Dec. 833, 838 (BIA 1994); *see also Matter of Stowers*, 22 I&N Dec. 605, 608 (BIA 1999).

B. Application to the Respondent's Case

As noted, the respondent conceded his removability under section 237(a)(1)(D)(i). Thus, the only issue is whether he is eligible for relief from removal. In addition to bearing the burden of establishing that a waiver of

the joint filing requirement is warranted under section 216(c)(4)(B), the respondent bears the burden of establishing his eligibility for a section 237(a)(1)(H) waiver of his removability. *See* INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A); *Pereida v. Wilkinson*, 141 S. Ct. 754, 760–61 (2021); 8 C.F.R. § 1240.8(d) (2021). Here, the respondent has not met either burden.

Although the respondent first argued during his removal proceedings that his marriage was entered into in good faith, he later admitted that he entered into this marriage for the express purpose of obtaining immigration benefits. He also submitted numerous false documents in support of his first joint petition. Nevertheless, he maintains on appeal that the Immigration Judge erred in finding him ineligible for a waiver under section 237(a)(1)(H) of the INA, arguing that his fraudulent marriage was the underlying reason for the termination of his conditional permanent resident status. As a result, he contends, he can use a section 237(a)(1)(H) waiver to cure the fraud underlying the termination of his conditional status and waive his removability under section 237(a)(1)(D)(i). We disagree.

The circumstances of the respondent's case are nearly identical to those in *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995), *aff'd Gawaran v. INS*, 91 F.3d 1332 (9th Cir. 1996). In that case, the respondent was charged with deportability under former section 241(a)(1) of the INA, 8 U.S.C. § 1251(a)(1) (1988), as a respondent who was excludable at the time of entry, and under former section 241(a)(9)(A) of the INA, 8 U.S.C. § 1251(a)(9)(A), as a respondent whose conditional status has been terminated.[4] In addition to seeking a waiver of her deportability under former section 241(f)(1) of the INA, 8 U.S.C. § 1251(f)(1), the predecessor of section 237(a)(1)(H), the respondent in *Matter of Gawaran* sought an "extreme hardship" waiver of the joint filing requirement pursuant to section 216(c)(4)(A) of the INA, 8 U.S.C. § 1186a(c)(4)(A) (1988).

The respondent argued former section 241(f)(1) waived the fraud underlying her deportability as a conditional resident whose status has been terminated because "her acquisition of conditional residence 'was tied directly to her original fraudulent behavior in entering the United States through a bigamous relationship.'" *Matter of Gawaran*, 20 I&N Dec. at 940–41. The Board rejected this argument, finding that, even if former section 241(f) waived the underlying fraud, it could not waive the respondent's deportability based on the termination of her conditional status, since that status "was terminated because she failed to file a joint petition to remove the conditional basis of her status," rather than marriage fraud.

[4] Former section 241(a)(1) was later renumbered as 237(a)(1)(A), and former section 241(a)(9)(A) was renumbered as section 237(a)(1)(D)(i). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 305(a)(2), 110 Stat. 3009-546, 3009-598.

Id. at 941 (noting that the legacy Immigration and Naturalization Service "did not allege any fraud or misrepresentation in connection with the . . . charge, nor was proof of fraud or misrepresentation required in order to sustain the charge of deportability").

In other words, we rejected the respondent's argument that her fraudulent behavior so thoroughly permeated all charges of deportability that she could use a fraud waiver to cure them all. We additionally concluded that she had waived the opportunity to have an "extreme hardship" waiver of the joint filing requirement considered because she did not seek this waiver before the Immigration Judge. *Id.* at 942.

Like the respondent in *Matter of Gawaran*, the respondent seeks to expand the use of the fraud waiver under section 237(a)(1)(H) to waive the joint filing requirement under section 216, even though he does not otherwise qualify for a waiver of that requirement under section 216(c)(4)(B). Section 216(c) does not contemplate that a fraud waiver under section 237(a)(1)(H) be used to waive the joint filing requirement. Moreover, the waiver set forth in section 216(c)(4)(B) requires the respondent to establish that he was not at fault in failing to meet the joint filing requirement and that his marriage was entered into in good faith. *See* 8 C.F.R. §§ 216.5(a)(1)(ii), 1216.5(a)(1)(ii). As noted, the respondent admitted in proceedings that his marriage was not bona fide and was entered into for the sole purpose of obtaining immigration benefits. *See Matter of McKee*, 17 I&N Dec. at 333.

The respondent seeks to circumvent the requirements of section 216 by utilizing an unrelated statutory provision, which only applies to his removability. The fraud waiver at section 237(a)(1)(H) does not supplant the joint petition requirement in section 216, nor does it excuse the respondent's failure to establish that his marriage was entered into in good faith. In effect, the respondent seeks to create a fraud waiver for the joint petition requirement, which does not exist in the statutory scheme and is inconsistent with Congress' aim in enacting section 216—namely, uncovering and deterring marriage fraud in immigration proceedings, while protecting law-abiding individuals seeking status through valid marriages. *See* H.R. Rep. No. 99-906, at 6–7; 132 Cong. Rec. 33,802–03; 132 Cong. Rec. 27,015–17.

In support of his arguments, the respondent relies on *Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010). In that case, the United States Court of Appeals for the Ninth Circuit held that section 237(a)(1)(H) of the INA, 8 U.S.C. § 1227(a)(1)(H), may waive a respondent's removability under

section 237(a)(1)(D)(i) where the termination of conditional status was based *solely* upon a finding of marriage fraud.[5]

We find *Vasquez* to be inapposite and unpersuasive. That case involved an applicant for a section 237(a)(1)(H) waiver whose joint petition was "denied on its merits . . . for marriage fraud"—not, as is the case here, the termination of conditional permanent residence for failure to file the joint petition. *Id.* at 1008. Significantly, the Ninth Circuit acknowledged in *Vasquez* that our decision in *Matter of Gawaran*, and the Ninth Circuit's decision affirming it, remain good law. *See id.* at 1010 ("[W]e hold that our decision in *Gawaran*, although it remains a binding precedent, does not apply to an alien whose conditional permanent residence was terminated not for failure to file a joint petition but upon a determination of marriage fraud."). We therefore reaffirm our holding in *Matter of Gawaran*, and conclude that its holding and reasoning, which relate to former section 241(f)(1), extend to the fraud waiver under section 237(a)(1)(H).

Pursuant to *Matter of Gawaran*, the respondent has not established that a fraud waiver under section 237(a)(1)(H) waives his removability under section 237(a)(1)(D)(i). The record reflects that the joint petition was deemed withdrawn by USCIS because his spouse withdrew her support from it, and the respondent has not shown that it was denied solely based on a finding of marriage fraud. We therefore conclude that a section 237(a)(1)(H) fraud waiver does not waive a respondent's removability under section 237(a)(1)(D)(i) where, as here, conditional permanent residence is terminated for failure to file a joint petition, a reason "separate and independent" from fraud.[6] *Gawaran*, 91 F.3d at 1335.

Nor can the respondent use the fraud waiver, which applies merely to grounds of removability, in place of, or in conjunction with, a "good faith" waiver of the joint filing requirement under section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B). Because the respondent's joint petition was withdrawn by operation of law, he had the burden to prove that he was eligible for a "good faith" waiver of the joint filing requirement by a preponderance of the evidence. *See Matter of Mendes*, 20 I&N Dec. at 838. We agree with the Immigration Judge that he cannot meet this burden because he admitted he entered into his marriage for the sole purpose of obtaining immigration benefits. *See generally Alom v. Whitaker*,

[5] Because the respondent's case arises within the jurisdiction of the Second Circuit, we apply the law of the Second Circuit and are not bound by the Ninth Circuit's decision in *Vasquez*. *See Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012).

[6] Under limited and specified circumstances, a section 237(a)(1)(H) waiver may waive a ground of removability based solely on fraud, and the ability to apply for such a waiver should not be dependent on how the respondent's designated ground of removal is charged. *See Vasquez*, 602 F.3d at 1015–16.

910 F.3d 708, 712 (2d Cir. 2018) (per curiam) (stating that a de novo review standard "applies to the mixed question of law and fact of whether [a respondent] established that his [or her] marriage was entered into in good faith"); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015) (noting that the Board reviews de novo whether the underlying facts found by an Immigration Judge meet the legal requirements for relief).

Since the waiver under section 237(a)(1)(H) does not extend beyond section 237(a)(1), it cannot be used in place of a "good faith" waiver under section 216(c)(4)(B) to waive the joint filing requirement under section 216, which is a distinct statutory provision. *See Matter of Tima*, 26 I&N Dec. 839, 843–44 (BIA 2016) (finding section 237(a)(1)(H) does not extend beyond section 237(a)(1)), *aff'd Tima v. Att'y Gen.*, 903 F.3d 272, 274, 278 (3d Cir. 2018). It is also incongruous for the respondent to both admit his marriage was fraudulent and simultaneously ask to use a fraud waiver under section 237(a)(1)(H) in conjunction with a "good faith" waiver under section 216(c)(4)(B). A fraudulent marriage cannot be entered into in good faith, and thus a respondent cannot receive a "good faith" waiver under section 216(c)(4)(B) where he admits to having entered a fraudulent marriage. *See* 8 C.F.R. §§ 216.5(e)(2), 1216.5(e)(2). A waiver of the joint petition requirement under section 216(c)(4), therefore, cannot truly be denied solely for fraud. A respondent who applies for a waiver necessarily cannot satisfy the joint petition requirement, and therefore the denial of the waiver will also be based on failure to meet the joint petition requirement. *See* INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); 8 C.F.R. § 216.5(a)(1). Accordingly, sections 237(a)(1)(H) and 216(c)(4)(B) apply in diametrically opposed circumstances—the former applies where fraud is present, while the latter only applies where fraud is absent. *See S.D. Warren Co. v. Me Bd. of Env't Prot.*, 547 U.S. 370, 380 (2006) (stating that statutory provisions "are not interchangeable, [where] they serve different purposes"). To hold otherwise would be a legal fiction and would create a fraud waiver to the joint petition statutory requirement not contemplated by Congress. We therefore conclude that a fraud waiver under section 237(a)(1)(H) cannot be used in place of, or in conjunction with, a "good faith" waiver of the joint filing requirement under section 216(c)(4)(B), and the respondent has not persuasively argued that Congress intended the waivers operate in this manner.

In conclusion, we agree with the Immigration Judge that the respondent has not met his burden of establishing that a fraud waiver under section 237(a)(1)(H) of the INA, 8 U.S.C. § 1227(a)(1)(H), waives his removability under 237(a)(1)(D)(i). We additionally agree with the Immigration Judge that a "good faith" waiver of the joint filing requirement is not warranted under section 216(c)(4)(B) of the INA, 8 U.S.C. § 1186a(c)(4)(B), and the respondent may not use a fraud waiver under section 237(a)(1)(H) in place

of, or in conjunction with, a "good faith" waiver. Because the respondent is removable as charged and he has not shown that he is eligible for relief from removal, his appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.